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Report to the Colorado General Assembly:

**RECOMMENDATIONS FOR 1986
COMMITTEE ON:**

Water and Land Resources



COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 299

December, 1985

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Colorado. General Assembly.
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Colorado Legislative Council
recommendations for 1986

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COLORADO LEGISLATIVE COUNCIL
RECOMMENDATIONS FOR 1986

*Colorado General Assembly, Legislative Council,
Committee on Water and Land Resources.*

COMMITTEE ON:

Water and Land Resources

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Legislative Council
Report to the
Colorado General Assembly

Research Publication No. 299
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To Members of the Fifty-fifth Colorado General Assembly:

Submitted herewith is the final report of the Committee on Water and Land Resources. The committee was appointed by the Legislative Council pursuant to House Joint Resolution No. 1025, 1985 session.

At its meeting of October 15, the Legislative Council reviewed the report and recommendations of the Committee on Water and Land Resources and approved a motion to forward the committee's recommendations to the Fifty-fifth General Assembly.

Respectfully submitted,

/s/ Representative Carl B "Bev" Bledsoe
Chairman
Colorado Legislative Council

CBB/pn

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LEGISLATIVE COUNCIL
COMMITTEE ON WATER AND LAND RESOURCES

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SUMMARY OF RECOMMENDATIONS

Introduction

Pursuant to House Joint Resolution No. 1025, the committee was charged with conducting a comprehensive review of various water and land resource issues. Included were matters relating to the development of water projects, the funding thereof, forms of mitigation, the role of the state engineer in water rights administration, and the role of the General Assembly in determining policy regarding state-owned lands administered by the State Board of Land Commissioners and other state agencies. Specifically, the committee was directed to study water and land resource issues, including, but not limited to the following:

- (a) compensatory storage;
- (b) the role of the state engineer in water rights administration;
- (c) nontributary ground water;
- (d) a determination of the state's role in dealing with the National Oceanic and Atmospheric Administration's Hydrometeorological Report No. 55;
- (e) observation of the implementation of the satellite stream-gauging system and the receiving of reports on progress or problems of the system;
- (f) receiving and reviewing of progress reports on possible litigation matters between Colorado and Kansas on water rights on the Arkansas River;
- (g) the establishment of procedures to facilitate the identification, evaluation, prioritization, scheduling, and funding of state water projects;
- (h) an evaluation of the present and future needs of the state with respect to state lands not under the jurisdiction of the state board of land commissioners, as well as a study of the current use and productivity of such lands, in order to develop recommendations concerning the disposition of such lands; and
- (i) the role of the General Assembly in determining state policy regarding state-owned lands administered by the State Board of Land Commissioners under the terms of the Enabling Act and the Constitution of the State of Colorado and a determination whether such land when it becomes viable for development should be leased on a long-term basis, traded, or sold, if the board should be authorized to increase its staff

capacity in managing such land, and whether a change in the state constitution is needed with respect to the authority of the board in administering such land.

The twelve bills recommended by the interim committee for legislative consideration during the 1986 session are the product of ten days of committee hearings. Two of the committee's meetings were held at Western State College, Gunnison, in conjunction with the 1985 Water Workshop. During these ten meetings consideration was given to the nine topics assigned to the committee.

Committee Recommendations

The committee offers the following recommendations for favorable consideration by the 1986 session of the Colorado General Assembly.

Water Projects -- Funding -- Mitigation

The committee proposes two bills which address the question of the funding of water projects and the mitigation of losses resulting from the diversion of water. Both bills propose a four-tenth of one percent increase in the sales and use tax and specify the purposes for which such revenue may be used. A third bill addresses, in a substantially different manner, the question of mitigation. That bill proposes allowing the water court judge (or a panel of water court judges) to determine if a mitigation fee should be assessed.

Concerning Creation of the Colorado Water Resources Development Fund, and Relating to Funding for the Construction of Water Projects, the Activities of the Water Quality Control Commission, and the Purposes of the Local Government Severance Tax Fund -- Bill 48. Bill 48 creates the Colorado Water Resources Development Fund financed by a four-tenth of one percent increase in the sales and use tax to be used for financing the construction of Colorado water projects, for dam safety and rehabilitation, for the purposes of the Colorado Water Conservation Board Construction Fund and for the purposes of the Colorado Water Resources and Power Development Authority. The bill would credit five percent of the moneys in the fund to the Water Quality Control Commission for the purpose of assisting in meeting water quality standards and five percent to the Local Government Severance Tax Fund to be used by the executive director of the Department of Local Affairs in distributing moneys or making loans, or both, to political subdivisions for certain activities with respect to domestic wastewater treatment works or potable water treatment facilities. The bill also guarantees that the money would be used to construct reservoir storage in Western Colorado with an available capacity of not less than 250,000 acre feet of which not less than 200,000 acre feet would be exclusively for uses in Western Colorado. Finally, the bill provides that the General Assembly must make an

annual appropriation to allocate the moneys from the fund and repeals the provisions of the act on July 1, 1991.

Concerning Water Projects, and Relating to Funding Thereof and Providing for Mitigation of Losses Resulting from Projects which Involve Diversions of Water -- Bill 49. As in Bill 48, Bill 49 provides for a four-tenth of one percent increase in the state's sales and use tax. It declares that the diversion of water from one basin for use in another basin has permanent significant impacts which require a balanced and integrated approach which addresses the state's water needs. The bill creates the Colorado Water Resources Development and Mitigation Fund to be used for financing the construction of Colorado water projects, for dam safety and rehabilitation, for environmental impact statements, or restoration or mitigation of transbasin impacts, and for the purposes of the Colorado Water Conservation Board Construction Fund and the Colorado Water Resources and Power Development Authority. The bill requires the development of a mitigation plan for any water project which would divert water from one basin for use in another basin. Moreover, no funding for such a water project can occur until such plan has been approved by the General Assembly and moneys appropriated to the authority for implementation of the plan. It requires that the General Assembly make an annual appropriation to allocate the moneys from the fund.

Concerning Mitigation of Adverse Effects Caused by Transbasin Diversions of Water -- Bill 50. Bill 50 provides that, whenever a water diversion is proposed, the water court shall determine whether the diversion creates an adverse impact that should be mitigated by the assessment of a fee. If requested by the applicant, the determination is to be made by a panel of three water judges. The bill also sets forth the impacts from diversions that may and may not be examined in making this determination. That is, the court may consider the impact of construction on housing and other public services necessary to support any increase in population and the impact on fish and wildlife. On the other hand, the bill specifies that it is the state's policy that the diverter is not responsible for mitigation in cases where lowered stream levels necessitate rewriting wastewater permits or when the removal of clean water degrades downstream water quality, such as stream segments impacted by abandoned mine drainage or wastewater discharges not in compliance with state issued permits.

Role of the State Engineer and Water Rights Administration

Concerning the Time of Filings and Responses in Water Determination Proceedings, and Making an Appropriation in Connection Therewith -- Bill 51. Bill 51 changes the periods of time required for specified actions of the clerk of the water court and the state engineer. These include the following:

- requiring the clerk of the water court to mail a water right application or statement of opposition to the state engineer and division engineer not later than fifteen days after the end of the month in which these documents were filed;
- changing from six to four months the time within which the state engineer shall consider a permit to construct a well;
- requiring the division engineer or state engineer to respond in writing not later than the last day of the third month in which a water application was filed; and
- requiring that intervention must be sought thirty days before any pretrial conference or due date for trial data certificates in proceedings before the water court.

Concerning Liability of the State of Colorado and its Officers and Employees for Acts or Omissions Regarding Reservoirs -- Bill 52. Bill 52 extends the concept of governmental immunity to the state, the state engineer, and to his employees, exempting them from liability for damages from water flows that are the result of any acts or omissions regarding water storage facilities.

Concerning the Storage of Water, and Relating to Facilities Constructed Therefor -- Bill 53. Bill 53 amends existing law concerning the storage of water. It states that the right to store water for application to beneficial use in natural or artificially constructed reservoirs constitutes a right of appropriation in order of priority. The bill mandates that construction or operation of such storage facilities must not impair the water rights of others.

Concerning the Liability for Damages Resulting from the Flow of Any Water from a Reservoir -- Bill 54. Bill 54 changes the grounds for liability for damages resulting from flows of water from a dam from one of strict liability to one requiring proof of negligent or careless maintenance of that facility. The bill also exempts boards of directors, shareholders and employees of such a facility from liability except in cases of criminal or fraudulent acts. Under Bill 54 liability would be limited to \$500,000 for all claims which arise out of any one occurrence.

Concerning Probable Future Water Flows, and Relating to Hazards Associated Therewith -- Bill 55. Bill 55 was developed in response to figures contained in the National Oceanic and Atmospheric Administration's Hydrometeorological Report No. 55. This report estimates the chances of catastrophic rainfall events in the Rocky Mountain region and impacts the safety criteria used for building water storage facilities. Bill 55 establishes a Colorado standard for making such estimates by providing for the use of surface water flows

for calculations of adequate dam and dam spillway design and safety criteria. It also provides the proper methods under state law for determining those flows, and relieves the state, its officers and employees from liability in the use of those calculations.

Concerning Judicial Determinations With Regard to a Change in a Point of Diversion, and, In Connection Therewith, Determining the Impact of Such a Change on Compliance with Interstate Compacts -- Bill 56. The purpose of this bill is to require the water court to consider the impact of any water depletions which would result from a change in a point of diversion and the effect of those depletions on meeting Colorado's compact obligations. Interstate compacts would be declared matters of statewide concern.

Concerning the Removal of Water from Irrigated Lands -- Bill 57. Bill 57 adds a requirement to the existing law on filing for a change of use or point of diversion. If the approval of a change of use or point of diversion will result in the removal of irrigation water from previously irrigated farmland, the bill provides that the applicant for such change must then certify that notice will be given to the local soil conservation district, to the board of county commissioners, and, if the applicant is not the landowner, to the landowner. Such notice is to state the location of the land which will be left without irrigation water and the approximate year in which the transition will occur.

Inventory of Dams

Concerning the Inventory of All Potential and Existing Dam and Reservoir Sites by the Colorado Water Conservation Board, and Making an Appropriation in Connection Therewith -- Bill 58. Bill 58 makes an appropriation of \$100,000 to the Water Conservation Board to compile an inventory of the state's existing, proposed, and potential dam and reservoir sites holding 1,000 acre-feet or more. Detailed data to be compiled in this inventory would include: 1) a list of all existing, proposed and potential dam sites; 2) a rough estimate of these dam sites' capacity; 3) a list of the owners and potential owners of the dams and reservoirs; 4) a list of the owners and potential owners of the water rights; and 5) an engineer's estimate of each site's design and construction costs. This inventory would be available to the General Assembly on or before February 1, 1987.

Timber Subject to Bidding Requirements

Concerning the Appraised Value of Timber Subject to Competitive Bidding Requirements -- Bill 59. Bill 59 raises the appraised value of timber on state land required to be advertised for competitive bidding from \$1,000 to \$5,000. Representatives of the State Board of

Land Commissioners suggested that the previous figure, due to inflation and other factors, was no longer appropriate.

Other Committee Activities

Role of the State Land Board and the Executive Director of the Department of Natural Resources

During the course of committee hearings, testimony indicated that misunderstandings and genuine differences of interpretation exist regarding the relationship between the executive director of the Department of Natural Resources and the State Land Board commissioners. These misunderstandings have generally evolved from different interpretations of the state constitution and various statutes, and are directly related to the implementation and formulation of administrative and policy matters between these two entities. For example, the extent of the director's supervisory control over the Land Board in administrative matters and policy determinations is a matter of some misunderstanding. As a result of these differences over the roles of the two entities, the committee requested a formal opinion from Attorney General Woodard. This opinion is found in Appendix B. In brief, the Attorney General concluded that under a Type I transfer, the Land Board exercises its statutory and constitutional powers, duties and functions independently of the executive director of the Department of Natural Resources. Moreover, these powers, duties and functions may not be transferred by the executive director to any other division, section or unit within the department. This issue is discussed in greater detail later in this report.

Colorado/Kansas Arkansas River Compact Dispute

Testimony from representatives of the Attorney General's Office, the Water Conservation Board, the State Engineer's Office and special counsel retained for this matter outlined the allegations against Colorado and the procedures being followed in the gathering of legal and engineering data in preparation for litigation between the two states. Due to the complexity of the situation, the committee sent a letter to the leadership of the General Assembly and members of the Joint Budget Committee, expressing its concern about the seriousness of the allegations and requesting further appropriations for the preparation of a defense.

Satellite Stream-Monitoring System

The Colorado satellite-linked monitoring system provides real-time water resources data on a continuous basis from key gauging stations across the state. The computerized system can be accessed by computer terminal from any location via telephone. These data and

appropriate applications software provide more effective water rights administration, computerized hydrologic records development, flood warning, and water resource management.

The system has been provided to the State Engineer by the Colorado Water Resources and Power Development Authority. The authority was convinced through a two-year demonstration project in the Arkansas River and Rio Grande basins that the system was an important tool in water resource management. Since the enhancement of water resource management is one of its goals, the authority elected to fund the installation of the system and its first year of operation at a cost of \$1.8 million.

The committee visited one of the stream gauging stations on the South Platte River and observed the functioning of the station as it monitored the river, gathered and stored various information and then transmitted this data to a satellite receiving dish. The information was then relayed to the computers housed in the Centennial Building. At the Centennial Building, the committee viewed a demonstration of the system's vast capabilities. For instance, video displays of present levels of various streams throughout the state were shown, and comparisons were made of present and past flows. It was pointed out that the system is being expanded with increased capabilities in such areas as water quality control, and the monitoring of interstate water compact obligations.

Nontributary Ground Water

The committee examined the status of the implementation of Senate Bill 5, Concerning Ground Water (1985 session), and received reports on the efforts of the State Engineer's Office and the Water Conservation Board regarding its implementation. Senate Bill 5 defined nontributary ground water and directed the state engineer to develop rules and regulations for the administration of well permits for this water. The state engineer described the geohydraulic mapping of the various basins and aquifers, and the conferences held to discuss proposed rules and regulations for the use of nontributary ground water. Moreover, the bill directed the Water Conservation Board to conduct a study of the state's ground water resources. The study's scope is to be determined by the board with the consultation of the Senate and House Agriculture committees during the 1986 legislative session.

BACKGROUND

Water Resource Development, Funding and Mitigation

The committee's charge, relating to the identification, evaluation, prioritization, scheduling, and funding of state water projects generated a discussion of the present and future water needs of the state. Information presented to the committee revealed that fiscal constraints at the federal level for future water storage projects and water treatment and delivery systems, has hampered local efforts to provide the facilities necessary for growing municipal and industrial development. At the same time, federal requirements for environmental impact statements, water quality standards, and protection and mitigation for damage to aquatic and wildlife habitat as a result of such projects have dramatically increased the costs of water projects. Water project development in Colorado is needed for several of the reasons outlined below.

- The future of irrigated agriculture will be one of steady decline unless adequate water supplies are available.
- Many of the major river basins such as the Arkansas, Rio Grande and South Platte are already legally over-appropriated. As a result, the chances of developing additional water supplies from any of these three river basins are poor.
- The increasing water demands of downstream states on the Colorado River may endanger the only significant, currently unused water supplies in Colorado. Such supplies occur in the Colorado River Basin where about 800,000 acre-feet of water is currently available from that river system for future use in Colorado. But the amount of water which Colorado may actually be able to use is uncertain. The multi-billion dollar Central Arizona Project will allow Arizona to divert 750,000 acre-feet of its unused entitlement from the Colorado River to supply the growing needs of Phoenix and Tucson. Competing for Colorado's unused allocation is the huge southern California metropolitan complex. Furthermore, two major projects designed to supply additional water to Colorado's Front Range, the Two Forks Project on the South Platte River above Denver and the Homestake II Project of Aurora and Colorado Springs both contemplate additional diversions from the Colorado River System.

Protecting Colorado River Compact Entitlements

The apportionment of water between the various states dependent on the Colorado River is affected by both international and interstate obligations. The Colorado River Compact, signed in 1922, equally divides the flow (estimated at that time at 15 million acre-feet annually) between the Upper Basin states -- Colorado, New Mexico, Utah and Wyoming -- and the Lower Basin states -- Arizona, Nevada and

California. The major purposes of this compact were to: 1) provide for an equitable division of the Colorado River; 2) establish relative importance of different beneficial uses of water; 3) promote interstate comity; 4) remove causes of present and future controversies, and 5) secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. Since 1922, however, annual run-off in the Colorado River has averaged closer to 13 million acre-feet, with flows decreasing to a low of nine million acre-feet in some years. The apportionment of the Colorado River is further stretched by an international obligation. The compact provides for a Mexican allocation, first from surplus waters above the 15,000,000 acre-feet per year, and secondly splits this obligation equally between the basins. If this surplus should fail to meet Mexico's needs, the burden of this deficiency is to be equally borne by both the Upper and Lower Basins.

Under Colorado's doctrine of prior appropriation, individuals who put water to beneficial use first create a valid right to the use of those waters. If a court were to extend this doctrine to the Colorado River Compact, Colorado's rights to its entitlements under the compact may dissolve. The courts could consider demand and historic flows, uphold the appropriation doctrine, and thereby sever any claims the state had to the unused entitlement under the compact.

A private developer's proposal to sell water to San Diego brings additional problems into sharp focus. That is, San Diego is especially concerned with the vulnerability of its supplies, ninety percent of which are purchased from the Los Angeles Metropolitan Water District. The city fears that its access to Colorado River water would be one of the first to decrease as Los Angeles attempts to meet its own growing needs. The Galloway Group, Ltd. proposed to build a series of reservoirs in Northwestern Colorado in which they would store water rights they have purchased in the area. The reservoirs are to be financed by the sale of water to San Diego. In order to do this, the group proposes to sell between 300,000 and 500,000 acre-feet of water to San Diego over a forty-year period. Colorado could withhold up to 50,000 acre-feet per year of that allotment during the first 25 years of the contract. Thereafter, with fifteen years notice, the state could withhold the entire amount for its own use.

This proposal has raised many concerns. Once growth has been established or maintained upon the delivered compact water, Colorado may not be able to withhold the deliveries even with proper notice. The group's representatives have stated that its plan would also benefit Colorado by securing a large portion of the state's remaining compact entitlements. However, others have questioned whether merely storing water is sufficient proof of beneficial use to override those of the Lower Basin states, maintaining that the state should encourage consumption of as much water as possible. Others countered that wasting water would not protect the state's share, but that storage, coupled with aggressive conservation efforts, would be viewed more favorably by the courts should competing demands arise.

Funding of Water Projects

Under the Galloway proposal, the construction costs of the storage reservoirs would be paid by the sale of water to San Diego (User-funded). This funding mechanism is essentially the method used by Colorado municipalities. A second method of funding water projects has also been proposed -- a statewide sales tax earmarked specifically for water projects. Both methods have strong proponents and opponents.

Opponents of a statewide sales tax contend that such financing would not be equitable in that the entire state would pay for water projects primarily benefiting Front Range communities. By imposing user fees, water projects could be funded by those benefiting from the project and the negative economic impact accruing from those diversions could be compensated by the fees. Proponents of user-oriented funding contend that this plan closely adheres to a market approach for the allocation of water and thus reflects a more accurate cost of the diverted water. In this manner, growth and development pay for their water usage. Moreover, a user-oriented funding is much more equitable for those communities who have already developed their own water supplies and who would, in effect, be taxed twice by the sales tax-based proposal.

Opponents of the user-oriented funding insist that if such funding is used, water tap fees will probably escalate to a point where only the wealthy could afford new housing. This would cause severe hardship in the construction industry and, eventually, harm the entire economy. User-oriented funding proponents point to the above-average river flows in the state during the past several years which have reduced the need for stored water. However, periodic droughts, lasting upwards of ten years, indicated by historic streamflow records, are the rule rather than the exception in Colorado. Coupled with continued growth, and without additional storage, such a drought could severely deplete existing storage reservoirs in the state and probably result in serious water shortages. This situation would be further aggravated by Colorado's commitments to deliver specified amounts of water mandated by various interstate compacts. The problem of supplying and storing water is not a single community problem, but is a statewide problem which, proponents argue, can best be solved by a statewide sales tax.

A third method of funding is embodied in House Bill 1070 (1985 session). As enacted, House Bill 1070 imposes a \$50 per-acre-foot surcharge on all water exported from the state. However, on September 10, 1985, the Attorney General, in an opinion to State Engineer Jeris A. Danielson, stated that such a fee could not be assessed (AG. File No. ONR8504066/AON). The Attorney General concluded that: "Colorado is not entitled to impose a fee on any export that is authorized by an interstate compact or judicial decree or is credited as a delivery by Colorado to another state pursuant to a compact or decree; and ... in any event, such an export fee violates the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution."

According to that opinion, Colorado cannot impose such a fee because it violates various judicial decisions that have established a doctrine of equality among the states. To do so would assert that the state has a superior claim to the waters being exported in violation of the concept of equitable apportionment of those waters. As noted above, the Attorney General's opinion maintains that such fees would also violate tenets of the various river compacts as well as the Commerce Clause of the United States Constitution.

Mitigation of Damages Caused by Water Diversions Within Colorado

The problem in Colorado is not a lack of water but one of maldistribution -- most of the state's precipitation falls on the Western Slope while the majority of the population lives on the eastern side of the Continental Divide. To solve this dilemma, water projects have been built, are being built and continue to be proposed, to pump water for the Front Range's needs over the Continental Divide.

In the process, Western Slope interests contend that the present and future vitality of their economy has been jeopardized. Front Range municipalities and other water interests argue that they have legally acquired the water rights and paid for the diversion projects and, therefore, should not be required to fund additional mitigation programs. When water is diverted from one basin to another, a series of permanent injuries can occur. Western Slope interests contend that with the diversion of water, river channels will be that much lower, riparian habitats will be that much drier, pumps will have to work that much harder, drought protection will be that much weaker and economic development and opportunities will be that much more limited. New water storage in and for basin users has sometimes been supplied to ease the injury.

The only form of mitigation mandated at the state level at present is that commonly referred to as compensatory storage and is required only of water conservancy districts. Compensatory storage basically requires developers to build water storage for Western Colorado as a partial replacement for water diverted out of a basin. That is, the statute governing water conservancy districts stipulate that any facilities intended to export water out of the natural basin of the Colorado River are to be designed so that the present appropriation and consumptive uses of those in the basin will not be impaired nor increased in cost. The statute further states that the means to accomplish this purpose are to be incorporated into any project for such exportations of water (section 37-45-118 (1) (b) (IV), C.R.S.).

Western Slope interests, however, increasingly point to adverse impacts other than lost water use associated with diversion projects which are not addressed by the above mentioned statutory provisions. These include new road maintenance costs, upkeep of recreational facilities created by storage projects, local property tax revenues lost when land is submerged, increased law enforcement demands and

related facilities, increased housing, sanitation and public service requirements and the more intangible losses such as environmental and aesthetic considerations and sociological concerns such as displaced citizens.

Those in opposition to compulsory mitigation argue that insufficient attention has been given to the benefits that water projects bring to the areas where they are constructed. Tourism, attracted by the recreational opportunities created by reservoirs, increases sales tax revenues while expanding the overall local economy. These areas also benefit from the overall growth stimulated in the state by the water's diversion to the Front Range. Municipalities generally oppose compensatory storage and Home Rule municipalities contend that they cannot be compelled by the state to fund such measures citing their constitutional stature. Municipalities and other entities interested in acquiring water argue that they should be left alone to develop their own mitigation agreements, if necessary, with the holders of the desired water rights; to proceed in any other fashion would violate constitutional prohibitions against interference with the allocation of water in the state. Lastly, opponents express concern that if mitigation plans are required and, as some propose, must be approved by the General Assembly, the process will unnecessarily burden that body as well as slow the development of the projects.

To provide for the funding and development of water projects the committee recommends two different bills. The differences between these bills point out the three issues around which committee debate revolved: 1) the equity of financing water projects with an increase in the state's sales and use tax versus funding those projects with user-related charges, for instance, a per-acre-foot fee charged to individuals proposing water diversions; 2) the need for Colorado to protect its remaining entitlements through beneficial use of those waters should deliveries above and beyond those mandated by compacts become the property of downstream states; and 3) the type and level of mitigation needed to offset large water diversions from the Western Slope to the urban centers of the Front Range. Both bills address the question of funding water projects. A third bill specifically addresses the mitigation of losses resulting from the diversion of water. The two funding bills propose a four-tenth of one percent increase in sales and use tax and specify the purposes for which the revenue may be used.

Bill 48 would create the Colorado Water Resources Development Fund. Moneys from the fund would be used for financing the construction of Colorado water projects, for dam safety and rehabilitation, and for the purposes of the Colorado Water Conservation Board Construction Fund and the Colorado Water Resources Power and Development Authority. Five percent of the annual revenues from the fund are to be credited to the Water Quality Control Commission for assistance in meeting water quality standards. Furthermore, five percent of the fund is credited to the Local Government Severance Tax Fund for distributing moneys or making loans

to political subdivisions with respect to domestic wastewater treatment works or potable water treatment facilities. The tax imposed would be repealed in 1991.

As in Bill 48, Bill 49 provides for a four-tenth of one percent increase in the states sales and use tax. It declares that the diversion of water from one basin for use in another basin has permanent significant impacts which require a balanced and integrated approach which addresses the state's water needs. The bill creates the Colorado Water Resources Development and Mitigation Fund to be used for financing the construction of Colorado water projects, for dam safety and rehabilitation, for environmental impact statements, for restoration or mitigation of transbasin impacts, and for the purposes established for the Colorado Water Conservation Board Construction Fund and the Colorado Water Resources and Power Development Authority. The bill requires the development of a mitigation plan by the authority for any water project which would divert water from one basin for use in another basin. Moreover, no funding for such a water project can occur until such plan has been approved by the General Assembly and moneys appropriated to the authority for implementation of the plan.

Another approach to resolving the questions of mitigation is outlined in Bill 50. Under the provisions of this bill, a panel of three water court judges would determine if a proposed water diversion would create such "significant adverse impacts" in the "reasonably foreseeable future" that the impacts should be mitigated by the assessment of a "reasonable fee". The bill further provides that the panel of judges consider the impact of construction of the water project on local housing and public services during the construction period and the impact of diversions on aquatic and wildlife habitat. The bill also lists impacts for which water diverters are not responsible. Such impacts include lowered stream flows that necessitate more stringent effluent and water quality requirements, changes in ground water table levels necessitating increased pumping requirements, lowered surface levels requiring changes in headgates to divert water, and additional burdens on present and future residents to obtain or develop additional water supplies.

Role of the State Engineer and Water Rights Administration

Colorado is the only western state where the administration of water rights and their adjudication are separated. Colorado divides the administration and adjudication of water rights between the state engineer and the water courts. Water rights determinations are exclusively vested in the water courts. The review process of the state engineer's decision is also different from other western states in that these technical decisions are reviewed by the water court. Other western states have an administrative review process in which determinations of technical facts, and the appropriateness of the action taken are based on the administrative record before it becomes necessary to resort to court action. In those states, the permit

application process as well as the adjudicatory process for those permits is vested in a single agency.

Some information suggests that Colorado's bifurcated system has become too litigious and thereby too costly and time-consuming. Those testifying suggested that the technical disputes need not always be resolved in the water court. It was also suggested that the period of comment on proposed water rights changes be increased and that the technical assistance available at the division engineer level also be increased. Under section 37-92-302, C.R.S., the state engineer has the specific authority to file statements and to enter into opposition to a water rights application case. In determining whether or not to enter a case, the state engineer has developed the following criteria as a guide.

1. Would the application, if adopted as filed, pose a threat to the water rights priority system?
2. Does the application contain factual information that is incorrect based upon field investigations?
3. Is the application so complex that the likelihood of injury to unknowing water users would occur?
4. Is the application opposed by sufficient objectors to ensure protection to other water users?
5. Is the application clearly contrary to established statutory or case law?
6. Is there a genuine public interest issue involved, i.e., impact on interstate compacts or injury to the priority system?
7. Is the application so complex that it will create administrative problems and require additional water commissioner staff unless direct input from this office is obtained? In most water courts, the only mechanism to have direct input on administrative problems is by filing a statement of opposition or a motion to intervene.

Bill 51 concerns the involvement of the state engineer in litigation regarding these statements of opposition. Testimony indicated that there is a tendency of the parties of interest to automatically file statements of opposition against applications for change in use or change in a point of diversion of water rights. Presently, the state engineer files his statement of opposition after the deadline for filing by other parties of interest, compelling the latter to file as a preventative measure. Basically, Bill 51 would decrease the amount of time allotted to the state engineer to make such a filing. The bill specifies the period of time within which the clerk of the water court would send a copy of an application for a water right or a statement of opposition thereto to the state engineer and the division engineer. In addition, the bill also changes the

period of time within which the state engineer could consider a well permit before the water court would hear an application for a right to that water.

Probable Future Water Flows -- Hydrometeorological Report No. 55

In March 1984, the National Oceanic Atmospheric Administration issued Hydrometeorological (HMR) Report No. 55 which contains the most recent figures for probable maximum precipitation (PMP) in Colorado. PMP is a theoretical estimate of the greatest amount (depth) of precipitation that could occur in a given area at a certain time. The magnitude of these figures have a bearing on dam structures, safety and flood control.

Testimony revealed that PMP values have increased dramatically in Colorado as a result of the data in HMR Report No. 55. In part, the report's figures may be influenced by the Big Thompson Flood of 1976. This increase in PMP values affects dam and dam spillway construction in that these values are used to judge the adequacy and standard of such structures in the event of a PMP occurrence. The increased PMP values makes Colorado's current dam structures out of compliance with the report and could drastically increase the cost of current and future impoundment projects. It was estimated that between \$200 and \$300 million would be needed to bring current water impoundment structures in the state into compliance with the report. Construction costs to enlarge or modify the spillways would increase the safety margins for overtopping of these structures but would not increase the potential for storage of water.

Much of the committee's discussion centered on the validity of the report's findings and the applicability of those findings to Colorado. Many believe the report is not adequately based on Colorado data, rather, it relies on data extrapolated from other high mountain areas with substantially different weather and precipitation patterns. The report's findings prompted the committee to suggest that a peer review of the report be conducted by local hydrologists, geologists, engineers and meteorologists. Such a review may more accurately identify those inconsistencies in the report as well as geographical areas, dam structures and relevant state policies that should be more closely examined. Furthermore, the committee decided to establish Colorado standards for determining the adequacy of dam construction. Bill 55 provides for the use of surface water flows for calculations of adequate dam and dam spillway design and safety criteria. It states that, in any case in which a determination of probable future surface water flows at any place is required, the calculations are to be based upon past surface water runoff at the place in question as determined by the records of reliable stream gauging stations. It also provides the proper methods under state law for determining those flows, and relieves the state, its officers and employees from liability in the use of those calculations.

Dam and Reservoir Liability

Subsequent to the committee's examination of HMR Report No. 55, the committee reviewed the status of dam owner liability in the instance of a dam failure, as well as the adequacy of current state inspection programs, the Governmental Immunity Act, and the concept of absolute liability versus negligence. Testimony suggested that the state engineer's office upgrade the standards used in its inspection program and that it also require dam owners to apply for certification through this program. This certification would relieve the state engineer from absolute liability. Furthermore, if a dam is certified as safe by the state engineer, and the owner maintains the dam in a safe condition, negligence must be proved before liability could be charged. Bill 54 expands on a change begun in 1984 from traditional Colorado law governing liability for dam failures. Until 1984, Colorado law provided a dam owner was strictly liable for the failure of a dam; negligence was not a factor to be considered. In 1984, the law was changed to provide that a dam owner would not be held strictly liable, absence proof of negligence, if the failure of the dam did not cause flooding outside of the one hundred year flood plain. Bill 54 would change the grounds for liability for damages from a dam failure from one of strict liability to one requiring the proof of negligence or careless maintenance of that facility, thus removing the one hundred year flood plain provision. Negligence would be the deciding factor in determining liability for any dam failure. The bill exempts boards of directors, shareholders and employees of such a facility from liability except in cases of criminal or fraudulent acts and limits this liability to \$500,000, for all claims which arise out of any one occurrence.

Regarding the Governmental Immunity Act, Bill 52 extends the concept of immunity to the state engineer, and to his employees, exempting them from liability for damages from water flows that are the result of any act or omission.

Storage of Water

Bill 53 amends existing law concerning the storage of water. It states that the right to store water for application to beneficial use in natural or artificially constructed reservoirs constitutes a right of appropriation in order of priority. It mandates that construction or operation of such storage facilities must not impair the water rights of others.

Change In a Point of Diversion

The committee expressed concern with planned diversions of water from agricultural land in the Arkansas Valley by the cities of Aurora and Colorado Springs and the subsequent effect of such diversion on compact obligations. Bill 56 would require the water court to consider the impact of any water depletions which would result from a

change in a point of diversion and the effect of those depletions on meeting Colorado's compact obligations.

Removal of Water From Irrigated Land

Changing a point of diversion and thus removing water from irrigated farm land produces a host of negative effects, such as soil erosion, spreading of noxious weeds, the loss of assessed property valuation and the burden on the remaining population to supply existing support services and retire bonds already issued. Bill 57 adds a requirement to the existing law on filing for a change of use or point of diversion. That is, if the approval of a change of use or point of diversion will result in the removal of irrigation water from previously irrigated farmland, the bill provides that the applicant for such change must certify that notice will be given to the local soil conservation district, to the board of county commissioners, and if the applicant is not the landowner, to the landowner. Such notice is to state the location of the land which will be left without irrigation water and the approximate year in which the transition will occur. Notice to the local soil conservation district would enable proper revegetation to be conducted for the land removed from irrigation.

Inventory of Dams and Reservoirs

Bill 58 deals with the compilation of information for an inventory of potential and existing dam and reservoir sites in Colorado. This inventory would be conducted by the Water Conservation Board. Although the majority of the information requested by the bill is already available, testimony indicated that the state lacks a central registry for this type of vital information. One possible reason for the absence of this central registry is due to the size of dams and reservoirs. Currently, the majority of existing and potential dam and reservoir sites are less than one thousand acre-feet. The magnitude of compiling an inventory of all dam and reservoir sites became apparent to the committee; however, by limiting the inventory to those dam sites holding one thousand acre-feet or more, the inventory would be much more manageable. This inventory would focus on such information as: existing, proposed and potential dams; owners and potential owners of water rights and the dams and reservoirs, and an engineer's estimate of design and construction costs of potential dams and reservoirs. To carry out this compilation, the bill provides for an appropriation of \$100,000 to the Water Conservation Board.

Colorado/Kansas Arkansas River Compact Dispute Report

The committee heard testimony concerning the state's dispute with Kansas pursuant to the Arkansas River Compact from representatives of the Attorney General's Office, the Colorado Water Conservation Board

and the State Engineer's Office, in addition to special counsel that has been retained for this matter. Specifically, Kansas alleges that Colorado has violated the compact in the following manner:

- 1) improper diversion of water to the Trinidad Reservoir;
- 2) post-compact well development in Colorado which has diverted Kansas' water entitlements; and
- 3) the operation of Pueblo Reservoir and the Winter Storage Program which is further depleting the Arkansas River of Kansas' entitlements.

Colorado counters that extensive well drilling by Kansas has depleted Arkansas River flows and that Kansas has diverted water for storage without compact administration approval. At the time of the hearings, both states were engaged in collecting relevant historical, legal, engineering, and hydrological data. The various strengths and weaknesses of Colorado's defense were discussed as were the procedures set forth in the compact for dispute resolution.

Kansas intends to file a lawsuit in December, 1985, with the United States Supreme Court to resolve this issue. Due to the complexity of the situation, the committee sent a letter to the leadership of the General Assembly and members of the Joint Budget Committee, expressing its concern about the seriousness of the allegations and requesting further appropriations for the preparation of Colorado's defense.

Whitewater Rafting Safety

Committee members also expressed an interest in reviewing current state oversight activities in the area of commercial rafting. This interest was sparked by several recent drownings in the state. Although this item was not among the committee's charges, the topic concerns the waters of the state and therefore lies within the scope of the charges.

Representatives of the commercial rafting industry, whitewater enthusiasts and the Division of Parks and Outdoor Recreation presented various proposals designed to prevent such accidents. Many of those testifying expressed doubt that further legislation or regulations would be effective given the inherent danger of whitewater sports and the fact that the victims appeared to have been in compliance with all applicable laws and regulations at the time. Additional safety suggestions mentioned were:

- the posting of warning signs upstream of water hazards;
- the painting of bridge pilings and abutments with stripes or florescent paint;

- the removal of obsolete structures or hazardous conditions from river courses;
- the placing of boulders in rivers to direct river flows away from hazards;
- the establishment of portage trails around dangerous structures;
- the building of boat chutes around dam spillways;
- preventing the placing of new bridge supports in inappropriate spots in rivers; and
- designing man-made structures to minimize the formation of dangerous currents.

Administration of State-Owned Lands

The Attorney General's opinion concerning the State Land Board is a result of differences in interpretation regarding the proper jurisdiction in administrative matters and policy determinations between the board and the executive director of the Department of Natural Resources. The board is constitutionally mandated to govern the public lands trust funds. However, certain of its functions within that charge are statutorily under the purview of the Department of Natural Resources by virtue of a Type 1 transfer.

Pursuant to the provisions of section 24-1-105 (1), C.R.S., agencies under Type 1 transfers "shall be administered under the direction and supervision of that principal department, but shall exercise its prescribed statutory powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications, independently of the head of the principal department... additionally... any powers, duties, and functions not specifically vested by statute in the agency being transferred, including but not limited to, all budgeting, purchasing, planning, and related management functions of any transferred department... shall be performed under the direction and supervision of the head of the principal department."

At issue for the Land Board is the executive director's contention that, under this type of transfer, his duties include participation in basic management decisions of the board as well as involvement in the review, drafting and approving of contracts issued by the board. The executive director also maintains that the Land Board has not sufficiently considered the views and wishes of citizens, legislators, experts and the Department of Natural Resources when making its decisions. The Land Board, on the other hand, views itself as the sole repository of such decisions regarding public lands under its jurisdiction. Toward this end, it invokes the Enabling Act, the Colorado Constitution, Attorney General's opinions and related

statutory, case and common law which grant to the Land Board the role of trustee charged with securing the maximum benefit from public lands in support of the public schools of the state.

The executive director has criticized the Land Board, for example, for not collecting royalties of over one million dollars past due on one particular coal lease. The Land Board counters that the problem centers on unclear language in the contract concerning the market value and sale price of the coal involved and that pursuing a remedy through the courts would be futile and expensive. The Land Board has instead sought the cooperation of the Legislative Audit Committee in examining the situation and establishing the market value for coal. Overall, the board contends that this, as well as other practices called into question during testimony, is a matter of policy and therefore not subject to review and modification by the executive director. As these misunderstandings have escalated, the Land Board claims that the executive director has increasingly used his budgetary and administrative prerogatives in an attempt to compel the board to amend or reverse its policy decisions.

After considering this matter, the interim committee decided that, instead of recommending constitutional changes or other measures to remove the Land Board from the oversight of the Department of Natural Resources, it would be more prudent to seek the state Attorney General's opinion regarding the respective duties and responsibilities of the State Land Board and executive director of the Department of Natural Resources.

As previously noted, the Attorney General concluded that under a Type 1 transfer, the Land Board exercises its statutory and constitutional powers, duties and functions independently of the executive director of the Department of Natural Resources. Moreover, these powers, duties and functions may not be transferred by the executive director to any other division, section or unit within the department.

However, those powers, duties and functions that are not vested in the Land Board by statute or constitution, and the budgeting, purchasing, planning and related management functions are to be performed by the Land Board under the direction of the executive director. Furthermore, the executive director may transfer, with the Governor's approval, these particular powers, duties and functions to other divisions, sections or units within the department.

Regarding personnel, the Attorney General determined that the Land Board is the appointing authority for all positions in which its personnel are performing functions that are specifically vested in the Land Board. Thus, the appointment, discipline and termination of these personnel rests with the Land Board. Conversely, the executive director, through his budgeting powers, determines the number of personnel. In addition, if the functions being performed by the affected personnel are not specifically vested in the Land Board then the department head has administrative control. Concerning sanctions

against the Land Board, the sole authority for this rests with the Governor, under article IV, section 6 (1) of the Colorado Constitution. However, these sanctions can only be imposed for incompetency, neglect of duty or malfeasance in office.

Two restraints are imposed on the Land Board by the Colorado Constitution regarding management of state lands. These restraints are that land management is subject to regulations adopted by the General Assembly and that the sale, lease, or exchange of state lands must secure the maximum possible amount. Unless specifically so restricted, the Land Board may sell, dispose, or manage state lands as the board deems most beneficial to the state. Since it has not been so restricted by the General Assembly, the board may open future grazing leases to hunting and fishing, it may exceed local zoning for open space unless this will not return to the state the maximum amount, and it may authorize multiple use of state lands. A copy of the opinion of the Attorney General is included in Appendix B.

Timber Subject to Bidding Requirements

At present, the State Land Board must conduct public bidding on timber contracts worth more than \$1,000. Representatives of the Land Board indicated that, due to inflation and the cost of soliciting bids on such small contracts, the one thousand dollar figure was no longer cost-effective. Legislation proposed by the committee (Bill 59) increases the threshold for such bids to \$5,000.

State-Owned Lands Administered by State Government Agencies

The committee was charged with evaluating the present and future needs of the state by examining present use, productivity and disposition of lands not under the jurisdiction of the State Land Board. Agencies testifying were asked to detail the location, current use, estimated value and future plans for their holdings in addition to identifying those parcels considered surplus to the agency's purposes.

Testimony and discussion with the agencies made it apparent that some of this information is not readily determinable. For instance, in the area of surplus lands, it was pointed out that there is no definition applicable across all agencies as to what constitutes "surplus" land. Additionally, what may be surplus to the needs of one agency may be of use to another. These interagency land exchanges are aggravated by a lack of communication between agencies regarding their separate land acquisition and disposal programs. Suggestions were put forth concerning the centralizing of this information in an existing or new agency or in a standing or special legislative oversight committee.

A list of total state land holdings per county (excluding State Land Board lands) was gathered from the presentations by various state

agencies and discussions with others regarding their present land holdings, and is contained in Appendix A.

A similar compilation has been performed in the past. In 1982, CRL Associates, Inc., conducted its State Inventory Project (SIP) under a contract with the state. The state Department of Administration (DOA) is also charged with the responsibility of conducting a similar inventory every two years under Senate Bill 369, 1983 -- the Real Property Inventory (RPI).

However, comparisons of figures from these sources and the testimony presented to the committee revealed significant discrepancies in some cases. For instance, holdings in Baca County for the Division of Wildlife are reported as 2,842.31 acres (SIP) and 5,139.31 acres (RPI), while documents furnished by the Division of Wildlife during testimony set the figure at 3,039.31 acres. Other differences include: land holdings in one report are expressed in acres while the same parcel is only described in the other report in terms of sections or location; and parcels may be listed in one report but not mentioned in the other. Discussions with state agency representatives produced several explanations for these differences, which are listed below.

- The information that each agency reports under section 24-30-1305.5 (1), C.R.S., is not independently reviewed for accuracy.
- On-going acquisitions and disposals are not reported to DOA in a timely or accurate manner. This may be a consequence of the biennial nature of its inventory in that many transactions can take place in two years, making any one inventory outdated soon after its issuance. This lack of timely notification occurs despite language in section 24-30-1303.5 (4), C.R.S., which states that "no acquisition or disposal of real property may be made and no funds or other valuable consideration may be given by a state department ... until a complete report of such transaction ... has been filed with the department of administration, and the department (of administration) has issued a written acknowledgement of the receipt of such report to the agency."
- Most departments only survey land holdings when these holdings are being considered for sale or exchange.
- In many instances, the acreage figures are educated guesses.

BILL 48

A BILL FOR AN ACT

1 CONCERNING CREATION OF THE COLORADO WATER RESOURCES
2 DEVELOPMENT FUND, AND RELATING TO FUNDING FOR THE
3 CONSTRUCTION OF WATER PROJECTS, THE ACTIVITIES OF THE
4 WATER QUALITY CONTROL COMMISSION, AND THE PURPOSES OF THE
5 LOCAL GOVERNMENT SEVERANCE TAX FUND.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Creates the Colorado water resources development fund to be used for financing the construction of Colorado water projects, for dam safety and rehabilitation, for the purposes established for the Colorado water conservation board construction fund and for the purposes of the Colorado water resources and power development authority. Credits a specified percentage of moneys in the fund to be used by the water quality control commission for the purpose of assisting in meeting water quality standards. Credits a specified percentage to the local government severance tax fund to be used by the executive director of the department of local affairs in distributing moneys or making loans, or both, to political subdivisions for certain activities with respect to domestic wastewater treatment works or potable water treatment facilities. Provides that the general assembly make an annual appropriation to allocate the moneys from the fund. Finances the fund from a four-tenth of one percent increase in the state sales and use taxes. Repeals the provisions of the act on a date certain.

1 Be it enacted by the General Assembly of the State of Colorado:

2 SECTION 1. Title 37, Colorado Revised Statutes, as
3 amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

4 ARTICLE 96

5 Colorado Water Resources

6 Development Fund

7 37-96-101. Colorado water resources development fund -
8 creation. (1) There is hereby created a fund to be known as
9 the Colorado water resources development fund, referred to in
10 this article as the "fund", which shall consist of all moneys
11 credited thereto and all moneys which may be otherwise made
12 available to it by the general assembly. All interest earned
13 from the investment of moneys in the fund shall be credited to
14 and become a part thereof. Such fund shall be a continuing
15 fund to be expended in the manner specified in subsections
16 (2), (3), (4), and (5) of this section and shall not revert to
17 the general fund of the state at the end of any fiscal year.

18 (2) All moneys credited to the fund shall be available
19 for appropriation by the general assembly for the following
20 purposes:

21 (a) Construction of Colorado water projects, including
22 feasibility studies and development of plans;

23 (b) Dam safety and rehabilitation.

24 (3) (a) In addition to the purposes stated in subsection
25 (2) of this section, such moneys shall be used for the
26 purposes established for the Colorado water conservation board

1 construction fund created in section 37-60-121 or the Colorado
2 water resources and power development authority established in
3 section 37-95-104.

4 (b) Five percent of the annual revenues credited to the
5 fund pursuant to section 39-26-123.2, C.R.S., shall be
6 transferred to the general fund for use by the water quality
7 control commission in the department of health for the purpose
8 of assisting in meeting water quality standards.

9 (c) Five percent of the annual revenues credited to the
10 fund pursuant to section 39-26-123.2, C.R.S., shall be
11 transferred to the local government severance tax fund created
12 in section 39-29-110 (1) (a), C.R.S., for the purposes
13 specified in section 39-29-110 (1) (b) (II) (A), C.R.S.

14 (4) In order that the people of the state of Colorado
15 may have and enjoy the perpetual use of those waters allocated
16 to the state of Colorado by interstate compact and to dispose
17 of any claims for compensatory storage originating within the
18 basin of origin because of transbasin diversions, which claims
19 appear to violate section 6 of article XVI of the constitution
20 of the state of Colorado, the moneys available in such fund
21 shall be used to construct reservoir storage in western
22 Colorado with an available capacity of not less than two
23 hundred fifty thousand acre-feet of water, of which amount,
24 not less than two hundred thousand acre-feet shall be
25 available for future exclusive uses in western Colorado on a
26 future reimbursable basis by water users in that area, and not
27 less than fifty thousand acre-feet shall be available to make

1 exchanges or compact deliveries required to accommodate
2 diversions from the Colorado river basin for uses outside the
3 basin within the state of Colorado on a reimbursable basis by
4 such outside users; except that such storage capacity for
5 exclusive uses in western Colorado shall be constructed only
6 in compliance with recommendations made jointly by the
7 Colorado river water conservation district and the
8 Southwestern water conservation district and upon such terms
9 and conditions as may be approved by the Colorado water
10 conservation board.

11 37-96-102. Repeal of article. This article is repealed,
12 effective July 1, 1991.

13 SECTION 2. 29-2-108 (1) and (3), Colorado Revised
14 Statutes, 1977 Repl. Vol., as amended, are amended to read:

15 29-2-108. Limitation on amount. (1) (a) In no case
16 shall the total sales tax or total use tax imposed by the
17 state of Colorado, any county, and any city or town in any
18 locality in the state of Colorado exceed seven percent; except
19 that this limitation shall not preclude a county sales tax or
20 use tax at a rate not to exceed one percent.

21 (b) (I) ON AND AFTER JULY 1, 1986, AND UNTIL JULY 1,
22 1991, THE LIMITATION IMPOSED BY PARAGRAPH (a) OF THIS
23 SUBSECTION (1) SHALL NOT EXCEED SEVEN AND FOUR-TENTHS PERCENT.

24 (II) THIS PARAGRAPH (b) IS REPEALED, EFFECTIVE JULY 1,
25 1991.

26 (3) The additional one-tenth of one percent tax imposed
27 by article 26.1 of title 39, C.R.S., shall be exempt from the

1 seven-percent limitation imposed by subsection (1) of this
2 section and from the seven and one-half percent limitation
3 imposed by subsection (2) of this section.

4 SECTION 3. 39-26-106 (1) (a), Colorado Revised Statutes,
5 1982 Repl. Vol., as amended, is amended to read:

6 39-26-106. Schedule of sales tax. (1) (a) (I) There is
7 imposed upon all sales of commodities and services specified
8 in section 39-26-104 a tax at the rate of three percent of the
9 amount of the sale, to be computed in accordance with
10 schedules or systems approved by the executive director of the
11 department of revenue. Said schedules or systems shall be
12 designed so that no such tax is charged on any sale of
13 seventeen cents or less.

14 (II) (A) ON AND AFTER JULY 1, 1986, AND UNTIL JULY 1,
15 1991, THE TAX IMPOSED BY SUBPARAGRAPH (I) OF THIS PARAGRAPH
16 (a) SHALL BE AT THE RATE OF THREE AND FOUR-TENTHS PERCENT.

17 (B) THIS SUBPARAGRAPH (II) IS REPEALED, EFFECTIVE JULY
18 1, 1991.

19 SECTION 4. Part 1 of article 26 of title 39, Colorado
20 Revised Statutes, 1982 Repl. Vol., as amended, is amended BY
21 THE ADDITION OF A NEW SECTION to read:

22 39-26-123.2. Credit of sales and use tax receipts to
23 Colorado water resources development fund. (1) An amount
24 equal to four-tenths of one percent of the net revenue from
25 sales and use taxes which otherwise would be credited to the
26 general fund shall be credited to the Colorado water resources
27 development fund created in section 37-96-101, C.R.S. Such

1 transfer shall be made as soon as possible after the twentieth
2 day of the month following the collection of such tax.

3 (2) This section is repealed, effective July 1, 1991.

4 SECTION 5. 39-26-202 (1), Colorado Revised Statutes,
5 1982 Repl. Vol., as amended, is amended to read:

6 39-26-202. Authorization of tax. (1) (a) There is
7 imposed and shall be collected from every person in this state
8 a tax or excise at the rate of three percent of storage or
9 acquisition charges or costs for the privilege of storing,
10 using, or consuming in this state any articles of tangible
11 personal property purchased at retail. Such tax shall be
12 payable to and shall be collected by the executive director of
13 the department of revenue and shall be computed in accordance
14 with schedules or systems approved by said executive director.

15 (b) (I) ON AND AFTER JULY 1, 1986, AND UNTIL JULY 1,
16 1991, THE TAX IMPOSED BY PARAGRAPH (a) OF THIS SUBSECTION (1)
17 SHALL BE AT THE RATE OF THREE AND FOUR-TENTHS PERCENT.

18 (II) THIS PARAGRAPH (b) IS REPEALED, EFFECTIVE JULY 1,
19 1991.

20 SECTION 6. Effective date. This act shall take effect
21 July 1, 1986.

22 SECTION 7. Safety clause. The general assembly hereby
23 finds, determines, and declares that this act is necessary
24 for the immediate preservation of the public peace, health,
25 and safety.

BILL 49

A BILL FOR AN ACT

1 CONCERNING WATER PROJECTS, AND RELATING TO FUNDING THEREOF AND
2 PROVIDING FOR MITIGATION OF LOSSES RESULTING FROM
3 PROJECTS WHICH INVOLVE DIVERSIONS OF WATER.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Declares that the diversion of water from one basin for use in another basin has permanent significant impacts which require a balanced and integrated approach which addresses the state's water needs.

Creates the Colorado water resources development and mitigation fund to be used for financing the construction of Colorado water projects, for dam safety, rehabilitation, and restoration for mitigation of transbasin impacts and for the purposes established for the Colorado water conservation board construction fund and the Colorado water resources and power development authority. Requires the development of a mitigation plan for any water project which would divert water from one basin for use in another basin. States that no funding for such a water project shall be made until such plan has been approved by the general assembly and moneys appropriated for implementation of the plan. Provides that the general assembly make an annual appropriation to allocate the moneys from the fund. Finances the fund from a four-tenth of one percent increase in the state sales and use taxes.

4 Be it enacted by the General Assembly of the State of Colorado:

1 SECTION 1. Title 37, Colorado Revised Statutes, as
2 amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

3 ARTICLE 96

4 Colorado Water Resources Development and Mitigation Fund

5 37-96-101. Legislative declaration. The general
6 assembly hereby recognizes the vital role the water resources
7 of this state play in the health and well-being of not only
8 the lives of the people of this state. The general assembly
9 further recognizes that, due to the lack of storage facilities
10 for water, a great amount of water which could be put to
11 beneficial use by the people of this state is not being put to
12 such use and is flowing out of this state. The general
13 assembly finds and declares that the diversion and storage of
14 water has impacts within the state; that the diversion of
15 water from one basin for use in another basin has impacts on
16 the state's ability to meet its obligations under the several
17 interstate water compacts; and that transbasin diversions also
18 have significant impacts on the economy, water supply, water
19 quality, recreational opportunities, and environment of the
20 basin from which water is diverted. The general assembly
21 hereby finds and declares that the state needs a balanced and
22 integrated system to address the complex issues surrounding
23 its water needs and a funding mechanism to provide revenues to
24 meet those needs.

25 37-96-102. Colorado water resources development and
26 mitigation fund - creation. (1) There is hereby created a
27 fund to be known as the Colorado water resources development

1 and mitigation fund, referred to in this article as the
2 "fund", which shall consist of all moneys credited thereto and
3 all moneys which may be appropriated thereto by the general
4 assembly or which may be otherwise made available to it by the
5 general assembly. All interest earned from the investment of
6 moneys in the fund shall be credited to the fund and become a
7 part thereof. Such fund shall be a continuing fund to be
8 expended in the manner specified in subsections (2) and (3) of
9 this section and shall not revert to the general fund of the
10 state at the end of any fiscal year.

11 (2) All moneys credited to the fund shall be available
12 for appropriation by the general assembly for the following
13 purposes:

14 (a) Construction of water projects in Colorado,
15 including feasibility studies and development of plans;

16 (b) Dam safety, rehabilitation, and restoration.

17 (c) Mitigation of impacts caused by the diversion of
18 water from one basin to another basin as provided in section
19 37-96-103.

20 (3) In addition to the purposes stated in subsection (2)
21 of this section, such moneys shall be used for the purposes
22 established for the Colorado water conservation board
23 construction fund created in section 37-60-121 or the purposes
24 established for the Colorado water resources and power
25 development authority established in section 37-95-106.

26 37-96-103. Mitigation of impacts - transbasin
27 diversions. (1) Any water project which diverts water from

1 one basin for use in another basin shall require the Colorado
2 water resources and power development authority to develop a
3 mitigation plan to mitigate the impact of such diversion on
4 the basin from which the water is diverted. The mitigation
5 plan shall provide for, but is not limited to:

6 (a) Construction of storage projects or other
7 appropriate physical facilities or other appropriate measures
8 for the protection of water quality, water supply, maintenance
9 of minimum streamflows, aquatic habitats, and present
10 recreational uses and for meeting interstate compact
11 requirements;

12 (b) Compensation to any owner of a water right when, as
13 a result of the diversion, the cost of putting such owner's
14 water to beneficial use has increased;

15 (c) Compensation to any unit of local government to
16 offset a decrease in tax revenues, or an increase in services
17 to any such unit;

18 (d) The development of delivery systems to put stored
19 water to beneficial use, when deemed appropriate by the
20 authority;

21 (e) The authority may participate with any state, local,
22 or federal governmental agency in the preparation of
23 environmental impact statements associated with water resource
24 development.

25 (2) Any owner of a water right may request to be
26 included in the mitigation plan if his claim for compensation
27 is compensable pursuant to the criteria for the mitigation

1 plan described in subsection (1) of this section as determined
2 by the authority.

3 (3) The Colorado water resources and power development
4 authority shall present the mitigation plan to the general
5 assembly for approval. No construction of a water project
6 which diverts water from one basin for use in another basin
7 shall commence until a mitigation plan is approved by the
8 general assembly and moneys appropriated to the authority for
9 construction and compensation pursuant to the provisions of
10 this section.

11 SECTION 2. 29-2-108 (1) and (3), Colorado Revised
12 Statutes, 1977 Repl. Vol., as amended, are amended to read:

13 29-2-108. Limitation on amount. (1) In no case shall
14 the total sales tax or total use tax imposed by the state of
15 Colorado, any county, and any city or town in any locality in
16 the state of Colorado exceed seven AND FOUR-TENTHS percent;
17 except that this limitation shall not preclude a county sales
18 tax or use tax at a rate not to exceed one percent.

19 (3) The additional one-tenth of one percent tax imposed
20 by article 26.1 of title 39, C.R.S., shall be exempt from the
21 seven AND FOUR-TENTHS percent limitation imposed by subsection
22 (1) of this section and from the seven and one-half percent
23 limitation imposed by subsection (2) of this section.

24 SECTION 3. 39-26-106 (1) (a), Colorado Revised Statutes,
25 1982 Repl. Vol., as amended, is amended to read:

26 39-26-106. Schedule of sales tax. (1) (a) There is
27 imposed upon all sales of commodities and services specified

1 in section 39-26-104 a tax at the rate of three AND
2 FOUR-TENTHS percent of the amount of the sale, to be computed
3 in accordance with schedules or systems approved by the
4 executive director of the department of revenue. Said
5 schedules or systems shall be designed so that no such tax is
6 charged on any sale of seventeen cents or less.

7 SECTION 4. Part 1 of article 26 of title 39, Colorado
8 Revised Statutes, 1982 Repl. Vol., as amended, is amended BY
9 THE ADDITION OF A NEW SECTION to read:

10 39-26-123.2. Credit of sales and use tax receipts to
11 Colorado water resources development and mitigation fund. An
12 amount equal to four-tenths of one percent of the net revenue
13 from sales and use taxes which otherwise would be credited to
14 the general fund shall be credited to the Colorado water
15 resources development and mitigation fund created in section
16 37-96-102, C.R.S. Such transfer shall be made as soon as
17 possible after the twentieth day of the month following the
18 collection of such tax.

19 SECTION 5. 39-26-202 (1), Colorado Revised Statutes,
20 1982 Repl. Vol., as amended, is amended to read:

21 39-26-202. Authorization of tax. (1) There is imposed
22 and shall be collected from every person in this state a tax
23 or excise at the rate of three AND FOUR-TENTHS percent of
24 storage or acquisition charges or costs for the privilege of
25 storing, using, or consuming in this state any articles of
26 tangible personal property purchased at retail. Such tax
27 shall be payable to and shall be collected by the executive

1 director of the department of revenue and shall be computed in
2 accordance with schedules or systems approved by said
3 executive director.

4 SECTION 6. Effective date. This act shall take effect
5 January 1, 1987.

6 SECTION 7. Safety clause. The general assembly hereby
7 finds, determines, and declares that this act is necessary
8 for the immediate preservation of the public peace, health,
9 and safety.

BILL 50

A BILL FOR AN ACT

1 CONCERNING MITIGATION OF ADVERSE EFFECTS CAUSED BY DIVERSIONS
2 OF WATER WITHIN THE STATE.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that, whenever a water diversion is proposed, the water court shall determine whether the diversion creates an adverse impact that should be mitigated by an assessment of a fee. Sets forth impacts from diversions that may and may not be examined in making this determination.

Provides that the water court, at an applicant's request, consist of a panel of three water judges.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 37-92-305, Colorado Revised Statutes, as
5 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
6 read:

7 37-92-305. Standards with respect to rulings of the
8 referee and decisions of the water judge. (12) Whenever any
9 water is proposed to be diverted from its basin of origin to
10 any other basin, the water court shall determine whether any

1 mitigating circumstances are necessary as a condition of any
2 requested conditional decree, change of use, or change in
3 point of diversion. In such cases the following shall apply:

4 (a) At the request of the applicant, the water court
5 shall consist of a special panel of three water judges. The
6 judges shall be as follows: The judge from the basin of
7 origin, the judge from the basin to which the water is
8 diverted, and a third judge selected by the other two within
9 forty-five days of the request. In the event that these two
10 judges cannot agree upon a selection, a third judge from any
11 other basin shall be selected by the clerk of the supreme
12 court within thirty days.

13 (b) The court or special panel shall determine whether
14 the removal of water from a water body in accordance with a
15 water right shall create in the reasonably foreseeable future
16 such significant adverse impacts that they should be mitigated
17 by an assessment of reasonable fees. The court or special
18 panel shall consider, but are not limited to:

19 (I) The impact of the construction process upon housing
20 and public services necessary to support any significant
21 increase in population required by the construction process;

22 (II) The impact of diversion upon fish and wildlife.

23 (c) The following impacts from transbasin diversions are
24 not, as a matter of state policy, the responsibility of the
25 diverter to mitigate:

26 (I) The lowering of stream levels such that wastewater
27 permits must be rewritten to require more stringent effluent

1 limitations and additional wastewater treatment;

2 (II) The removal by diversion of clean water such that
3 water quality degrades in downstream locations such as stream
4 segments impacted by abandoned mine drainage or wastewater
5 dischargers not in compliance with state-issued permits;

6 (III) The lowering of groundwater table levels such that
7 pumping requirements are increased;

8 (IV) The lowering of surface water levels such that
9 headgate facilities must be reconstructed to effectively
10 divert lower stream flow levels;

11 (V) Additional burden on present or future residents to
12 obtain or develop additional water supplies.

13 SECTION 2. Effective date. This act shall take effect
14 January 1, 1987.

15 SECTION 3. Safety clause. The general assembly hereby
16 finds, determines, and declares that this act is necessary
17 for the immediate preservation of the public peace, health,
18 and safety.

BILL 51

A BILL FOR AN ACT

1 CONCERNING THE TIME OF FILINGS AND RESPONSES IN WATER
2 DETERMINATION PROCEEDINGS, AND MAKING AN APPROPRIATION IN
3 CONNECTION THEREWITH.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Specifies the period of time within which the clerk of the water court shall send a copy of an application for a water right or a statement of opposition thereto to the state engineer and the division engineer. Changes the period of time within which the state engineer shall consider a permit to construct a well before the water court may hear an application for a water right with respect to such well. Changes the period of time within which the state engineer or division engineer shall respond in writing to an application for a water right.

In proceedings before the water court, provides that intervention must be sought thirty days before any pretrial conference or due date for trial data certificates.

Makes an appropriation.

4 Be it enacted by the General Assembly of the State of Colorado:

5 SECTION 1. 37-92-302 (1) (a), (1) (b), (1) (c), (2), and
6 (4), Colorado Revised Statutes, as amended, are amended to

1 read:

2 37-92-302. Applications for water rights or changes of
3 such rights - plans for augmentation. (1) (a) Any person who
4 desires a determination of a water right or a conditional
5 water right and the amount and priority thereof, including a
6 determination that a conditional water right has become a
7 water right by reason of the completion of the appropriation,
8 OR a determination with respect to a change of a water right,
9 THE approval of a plan for augmentation, A quadrennial finding
10 of reasonable diligence, or THE approval of a proposed or
11 existing exchange of water under section 37-80-120 or
12 37-83-104, or THE approval to use water outside the state
13 pursuant to section 37-81-101 shall file with the water clerk
14 in quadruplicate a verified application setting forth facts
15 supporting the ruling sought, a copy of which shall be sent by
16 the water clerk to the state engineer and the division
17 engineer NOT LATER THAN FIFTEEN DAYS AFTER THE END OF THE
18 MONTH IN WHICH THE APPLICATION WAS FILED.

19 (b) Any person, including the state engineer, who wishes
20 to oppose the application may file with the water clerk in
21 quadruplicate a verified statement of opposition setting forth
22 facts as to why the application should not be granted or why
23 it should be granted only in part or on certain conditions.
24 Such statement of opposition may be filed on behalf of all
25 owners of water rights who by affixing their signatures to
26 such statement of opposition, in person or by attorney,
27 consent to being included in such statement and who may be

1 detrimentally affected by granting of the application. The
2 water clerk shall mail a copy of such statement of opposition
3 to the state engineer and the division engineer NOT LATER THAN
4 FIFTEEN DAYS AFTER THE END OF THE MONTH IN WHICH THE STATEMENT
5 OF OPPOSITION WAS FILED.

6 (c) Such statement of opposition must be filed by the
7 last day of the ~~second~~ FOURTH month following the month in
8 which the application is filed.

9 (2) The water judges of the various divisions shall
10 jointly prepare and supply to the water clerks standard forms
11 which shall be used for such applications and statements of
12 opposition. These forms shall designate the information to be
13 supplied and may be modified from time to time. Supplemental
14 material may be submitted with any form. In the case of
15 applications for a determination of a water right or a
16 conditional water right, the forms shall require, among other
17 things, a legal description of the diversion or proposed
18 diversion, a description of the source of the water, the date
19 of the initiation of the appropriation or proposed
20 appropriation, the amount of water claimed, and the use or
21 proposed use of the water. In the case of applications for
22 approval of a change of water right or plan for augmentation,
23 the forms shall require a complete statement of such change or
24 plan, including a description of all water rights to be
25 established or changed by the plan, a map showing the
26 approximate location of historic use of the rights, and
27 records or summaries of records of actual diversions of each

1 right the applicant intends to rely on to the extent such
2 records exist. In the case of applications which will require
3 construction of a well, other than applications for
4 determinations of rights to ground water from wells described
5 in section 37-90-137 (4), no application shall be heard on its
6 merits by the referee or water judge until the application
7 shall be supplemented by a permit or evidence of its denial by
8 the state engineer pursuant to section 37-90-137 or evidence
9 of the state engineer's failure FOR ANY REASON WHATSOEVER to
10 grant or deny such a permit within ~~six~~ FOUR months after
11 application to the state engineer therefor. In the case of
12 applications for determinations of rights to ground water from
13 wells described in section 37-90-137 (4), the application
14 shall be supplemented by evidence that the state engineer has
15 issued or failed to issue, within four months of the filing of
16 the application in water court, a determination as to the
17 facts of such application. Such state engineer's
18 determination shall be made by the state engineer upon his
19 receipt from the water clerk of a copy of the application, and
20 no separate filing or docketing with the state engineer shall
21 be required.

22 (4) The referee, without conducting a formal hearing,
23 shall make such investigations as are necessary to determine
24 whether or not the statements in the application and
25 statements of opposition are true and to become fully advised
26 with respect to the subject matter of the applications and
27 statements of opposition. The referee shall consult with the

1 appropriate division engineer or the state engineer or both.
2 The ~~engineer-consulted~~ DIVISION ENGINEER OR THE STATE ENGINEER
3 OR BOTH shall respond in writing ~~within--thirty--days;--unless~~
4 ~~such--time--is--extended--by--the--referee~~ NOT LATER THAN THE LAST
5 DAY OF THE THIRD MONTH IN WHICH AN APPLICATION WAS FILED,
6 which writing shall be filed in the proceedings and mailed by
7 the water clerk to all parties of record before any ruling
8 shall be entered or become effective. A water judge who is
9 acting as a referee in his division shall have the same
10 authority as provided for the referee in this subsection (4).
11 If the application is rereferred to the water judge by the
12 referee prior to consultation, the division engineer shall
13 furnish a written recommendation to the court within thirty
14 days of rereferral. Such report shall be filed in the
15 proceedings and mailed by the water clerk to all parties of
16 record before any ruling shall be entered or become effective.
17 The water judge may request such written report from the state
18 engineer if he desires.

19 SECTION 2. 37-92-304 (3), Colorado Revised Statutes, as
20 amended, is amended to read:

21 37-92-304. Proceedings by the water judge. (3) As to
22 the rulings with respect to which a pleading has been filed
23 and as to matters which have been rereferred to the water
24 judge by the referee, there shall be de novo hearings. The
25 court shall not be bound by findings of the referee. The
26 division engineer shall appear to furnish pertinent
27 information and may be examined by any party, and if requested

1 by the division engineer, the attorney general shall represent
2 the division engineer. The applicant shall appear either in
3 person or by counsel and shall have the burden of sustaining
4 the application, whether it has been granted or denied by the
5 ruling or been rereferred by the referee, and in the case of a
6 change of water right or a plan for augmentation the burden of
7 showing absence of any injurious effect. Any person may move
8 to intervene in proceedings before the water court upon
9 payment of a fee, equal to that for filing an answer to a
10 civil action in district court, except for the state engineer
11 who shall pay no fee, and upon a showing of mistake,
12 inadvertence, surprise, or excusable neglect or to support a
13 referee's ruling. The water court shall grant the motion to
14 intervene only if intervention is sought within thirty days
15 before any pretrial conference or due date for trial data
16 certificates and intervention will not unduly delay or
17 prejudice the adjudication of the rights of the original
18 parties. Service of copies of applications, written
19 pleadings, or any other documents is not necessary for
20 jurisdictional purposes, but the water judge may order service
21 of copies of any documents on any persons and in any manner
22 which he deems appropriate.

23 SECTION 3. Appropriation. In addition to any other
24 appropriation, there is hereby appropriated, out of any moneys
25 in the general fund not otherwise appropriated, to the state
26 engineer, for the fiscal year commencing July 1, 1986, the sum
27 of _____ dollars, (\$ _____), or so much thereof as may be

1 necessary, for the implementation of this act.

2 SECTION 4. Effective date - applicability. This act
3 shall take effect July 1, 1986, and shall apply to all
4 applications for a permit or water right filed on or after
5 said date.

6 SECTION 5. Safety clause. The general assembly hereby
7 finds, determines, and declares that this act is necessary
8 for the immediate preservation of the public peace, health,
9 and safety.

BILL 52

A BILL FOR AN ACT

1 CONCERNING LIABILITY OF THE STATE OF COLORADO, AND ITS
2 OFFICERS AND EMPLOYEES FOR ACTS OR OMISSIONS REGARDING
3 RESERVOIRS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that statutory provisions regarding reservoirs are discretionary and undertaken by the state of Colorado in the exercise of its governmental authority. Exempts the state of Colorado, the state engineer, and his staff and appointees from liability in damages in reference to any acts or omissions regarding reservoirs.

4 Be it enacted by the General Assembly of the State of Colorado:

5 SECTION 1. 37-87-115, Colorado Revised Statutes, is
6 amended to read:

7 37-87-115. Damages. THE PROVISIONS OF THIS ARTICLE ARE
8 UNDERTAKEN BY THE STATE OF COLORADO IN THE DISCRETIONARY
9 EXERCISE OF ITS GOVERNMENTAL AUTHORITY. THEREFORE, neither
10 the STATE OF COLORADO, THE state engineer nor any member of

1 his staff or any person appointed by him shall be liable in
2 damages for any act done by him OR FOR HIS FAILURE TO ACT in
3 pursuance of the provisions of this article.

4 SECTION 2. Safety clause. The general assembly hereby
5 finds, determines, and declares that this act is necessary
6 for the immediate preservation of the public peace, health,
7 and safety.

BILL 53

A BILL FOR AN ACT

1 CONCERNING THE STORAGE OF WATER, AND RELATING TO FACILITIES
2 CONSTRUCTED THEREFOR.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

States that the right to store water for application to beneficial use in natural or artificially constructed reservoirs constitutes a right of appropriation in order of priority as guaranteed by the Colorado constitution. Mandates that no water storage facility may be constructed, maintained, or operated in such a manner as to impair the water rights of another. Allows the use of the laws of eminent domain to acquire those interests in real property reasonably necessary for the construction, maintenance, or operation of any water storage reservoir, together with inlet or outlet canals or other waterworks necessary to make such reservoir effective.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 37-87-101 (1), Colorado Revised Statutes, as
5 amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

6 37-87-101. Storage of water. (1) The right to store
7 water for application to beneficial use in natural or

1 artificially constructed reservoirs constitutes a right of
2 appropriation in order of priority guaranteed by the Colorado
3 constitution. No water storage facility creating the storage
4 of water may be constructed, maintained, or operated in such a
5 manner as to impair the appropriative rights duly decreed to
6 any other appropriator. Acquisition of those interests in
7 real property reasonably necessary for the construction,
8 maintenance, or operation of any water storage reservoir,
9 together with inlet or outlet canals or other waterworks
10 necessary to make such reservoir effective to accomplish the
11 beneficial use or uses of water stored or to be stored
12 therein, may be secured under the laws of eminent domain.

13 SECTION 2. Effective date. This act shall take effect
14 July 1, 1986

15 SECTION 3. Safety clause. The general assembly hereby
16 finds, determines, and declares that this act is necessary
17 for the immediate preservation of the public peace, health,
18 and safety.

BILL 54

A BILL FOR AN ACT

1 CONCERNING THE LIABILITY FOR DAMAGES RESULTING FROM THE FLOW
2 OF ANY WATER FROM A RESERVOIR.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that the owner of a reservoir shall be liable for damage resulting from any flow of water from such reservoir if such flow is due to the improper, negligent, or careless design, construction, maintenance, or operation of such reservoir or failure to use reasonable care in the construction, maintenance, or operation of such reservoir. Specifies that no employee, shareholder, officer, or member of a board of directors of an owner of a reservoir or the owner of a right to withdraw water from a reservoir shall be liable for damages resulting from the flow of any water from a reservoir unless such flow is the result of a criminal, fraudulent, dishonest, malicious, or ultra vires act. States that, if insurance coverage is obtained for any such liabilities in a specified aggregate amount for all claims which arise out of any one occurrence, the maximum amount that may be recovered by any one person is limited to a specified amount.

3 Be it enacted by the General Assembly of the State of Colorado:
4 SECTION 1. 37-87-104, Colorado Revised Statutes, as
5 amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

1 37-87-104. Liability of owners for damage.

2 (1) Notwithstanding the provisions of any other law, the
3 owner of a reservoir shall be liable for damage resulting from
4 any flow of water from such reservoir only if such flow is due
5 to the improper, negligent, or careless design, construction,
6 maintenance, or operation of such reservoir or the failure to
7 use reasonable care in the construction, maintenance, or
8 operation of such reservoir. Neither punitive damages nor
9 exemplary damages may be awarded for damage resulting from any
10 flow of water from a reservoir.

11 (2) No employee, shareholder, officer, or member of a
12 board of directors of an owner of a reservoir and no owner of
13 a right to withdraw water from a reservoir shall be liable for
14 damage resulting from any flow of water from such reservoir
15 unless the occurrence causing such damage has resulted from a
16 criminal, fraudulent, dishonest, malicious, or ultra vires act
17 by such employee, shareholder, officer, or member of a board
18 of directors of an owner of a reservoir or by the owner of a
19 right to withdraw water from a reservoir.

20 (3) If insurance coverage is provided with respect to
21 any of the liabilities stated in this section in an aggregate
22 amount of not less than five hundred thousand dollars for all
23 claims which arise out of any one occurrence, the maximum
24 amount that may be recovered respecting the damage so insured
25 by any one person in any single occurrence shall be fifty
26 thousand dollars.

27 (4) Notwithstanding the provisions of section 37-87-113,

1 in no event shall the owner of a reservoir, in the absence of
2 negligence, be liable for damages resulting from flows of
3 water from such reservoir which are of insufficient magnitude
4 to exceed the limits of the one-hundred-year floodplain as
5 defined in section 37-87-102 (1) (d). Any provision of this
6 subsection (4) to the contrary notwithstanding, the owner of
7 any reservoir, without liability therefor, may pass inflows
8 through the reservoir without diminution.

9 SECTION 2. Safety clause. The general assembly hereby
10 finds, determines, and declares that this act is necessary
11 for the immediate preservation of the public peace, health,
12 and safety.

BILL 55

A BILL FOR AN ACT

1 CONCERNING PROBABLE FUTURE WATER FLOWS, AND RELATING TO
2 HAZARDS ASSOCIATED THEREWITH.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Establishes a method to be used for determining future water flows for purposes of designing and constructing a reservoir. States that, in any case in which a determination of probable future surface water flows at any place in the state is required, the calculations shall be based upon past surface water runoff at the place in question as determined by the records of reliable stream gauging stations. Determinations of probable runoff at locations other than reliable stream gauging stations shall be made by relating the probable future runoff at that location to the recorded runoff at a comparable gauging station. Provides criteria for determining comparable locations. Requires the state engineer to promulgate rules and regulations which include other factors for consideration when determining probable future runoff. States that no dam safety requirement shall be imposed to meet a potential hazard of a flood the magnitude of which is such that the hazard would probably exist whether the dam failed or not. Allows the interpolation and correlation of known records of flows to determine flows for a longer period. Provides that, if damages occur and such damages could not have been predicted, then any person, the state, or any public official or employee acting in performance of his public duty shall not be liable for such damage.

1 Be it enacted by the General Assembly of the State of Colorado:

2 SECTION 1. 37-87-102 (2) and (3), Colorado Revised
3 Statutes, as amended, are REPEALED AND REENACTED, WITH
4 AMENDMENTS, to read:

5 37-87-102. Definitions - natural streams and use thereof
6 by reservoir owners. (2) Whenever the records basic to a
7 determination of probable future water flows, either with
8 respect to this section or by other requirements of law,
9 extend for a period of one hundred or more years, the
10 determination shall be made by interpolation and correlation
11 to a full one hundred years of records by relating them to
12 known records of water basins as similar as reasonably
13 possible to the basin under consideration or by other
14 acceptable methods.

15 (3) (a) In any case in which a determination of probable
16 future surface water flows at any place in the state is
17 required, the calculation shall be based upon past surface
18 water runoff at the place in question supplemented as provided
19 in this section. Such probable flows shall be determined by
20 reference to the records of reliable stream gauging stations.
21 A stream gauging station record shall be deemed reliable if
22 made by the state of Colorado or the United States as part of
23 a regular program of either of those entities, except as to
24 any part of such records which the state engineer shall have
25 designated as being unreliable, on the basis of facts so
26 showing. Whenever a designation of probable future runoff is
27 required at a place other than the location of a reliable

1 stream gauging station, the determination of probable runoff
2 at such other place shall be made by relating the probable
3 future runoff at that place to the recorded runoff at a
4 comparable gauging station or gauging stations by the
5 interpolation of reasonable hydrologic, geologic, and natural
6 vegetative factors supplemented as provided in this section.
7 Unless clearly unrelated, the factors of the comparison shall
8 include, but not be limited to, the following elements or
9 characteristics:

10 (I) The water basin contributing to the probable future
11 flow at the place where probable future runoff is to be
12 determined, considering:

- 13 (A) The size;
- 14 (B) The altitude or altitudes;
- 15 (C) The various soil permeabilities;
- 16 (D) The various vegetative covers;

17 (II) The known runoff as determined by reliable stream
18 gauging stations using interpolations when necessary from
19 comparable gauging stations and relating interpolations to the
20 characteristics of the basin measured by the comparable
21 gauging stations as related to the basin of runoff being
22 determined;

23 (III) The slope or slopes of the terrain whose surface
24 runoff contributes to the surface water flows at the place at
25 which a determination of probable future surface water flows
26 is required.

27 (b) The state engineer shall promulgate rules pursuant

1 to section 24-4-103, C.R.S., which include other factors for
2 consideration in any area or situation in which calculations
3 based on the criteria in paragraph (a) of this subsection (3)
4 will probably be made more accurate by use of other or
5 additional criteria. Whenever conditions are such that
6 records of past precipitation are an appropriate factor, he
7 may designate any portion of official precipitation records of
8 agencies of the United States or of the state of Colorado
9 which are appropriate in evaluating probable future water
10 flows. He may approve use of factors referred to in this
11 paragraph (b) with respect to particular areas or design of
12 specific structures when requested to do so.

13 (c) No dam safety requirement shall be imposed to meet a
14 potential hazard of a flood whose magnitude is such that the
15 hazard would probably exist whether or not the dam failed.

16 SECTION 2. 37-87-102, Colorado Revised Statutes, as
17 amended, is amended BY THE ADDITION OF THE FOLLOWING NEW
18 SUBSECTIONS to read:

19 37-87-102. Definitions - natural streams and use thereof
20 by reservoir owners. (3.5) Whenever a termination of
21 probable future surface water flows, or the probability of
22 frequency of their recurrence, at any place in Colorado is
23 required by relation to a longer period of flow than that for
24 which there is a reliable record of flow as defined in
25 subsection (3) of this section, the determination shall be
26 made by interpolation and correlation of known records to the
27 longer period by relating known records of water basins as

1 similar as reasonably possible to the place of determination
2 or basin under consideration, or by use of geologic
3 determinations, or by use of other methods reasonably
4 calculated to formulate an accurate estimate of probable
5 future flows or the probability of frequency of their
6 recurrence at the place of determination of such flows.

7 (3.7) Calculations of probable flows or frequency of
8 recurrence based upon application of the principles set forth
9 in subsections (3) and (3.5) of this section shall relieve
10 anyone acting in accordance with such principles of any
11 liability respecting an occurrence different than that
12 predicted. This exemption from liability shall apply to the
13 state and its public officials or employees when acting in
14 performance of their public duties.

15 SECTION 3. Safety clause. The general assembly hereby
16 finds, determines, and declares that this act is necessary
17 for the immediate preservation of the public peace, health,
18 and safety.

BILL 56

A BILL FOR AN ACT

1 CONCERNING JUDICIAL DETERMINATIONS WITH REGARD TO A CHANGE IN
2 A POINT OF DIVERSION, AND, IN CONNECTION THEREWITH,
3 DETERMINING THE IMPACT OF SUCH A CHANGE ON COMPLIANCE
4 WITH INTERSTATE COMPACTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Requires the water court to consider any depletions which would result from a change in a point of diversion and the effect of those depletions on meeting any obligation for delivering water to any state pursuant to an interstate compact. Declares interstate compacts to be matters of statewide concern.

5 Be it enacted by the General Assembly of the State of Colorado:

6 SECTION 1. 37-92-305, Colorado Revised Statutes, as
7 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
8 read:

9 37-92-305. Standards with respect to rulings of the
10 referee and decisions of the water judge. (12) In reviewing

1 a proposed plan for changing a point of diversion, the referee
2 or the water judge shall consider any depletions which would
3 result from such change and the effect of those depletions on
4 meeting any obligation for delivering water to any state
5 pursuant to an interstate compact. For purposes of this
6 subsection (12), interstate compacts are declared to be
7 matters of statewide concern.

8 SECTION 2. Effective date. This act shall take effect
9 July 1, 1986.

10 SECTION 3. Safety clause. The general assembly hereby
11 finds, determines, and declares that this act is necessary
12 for the immediate preservation of the public peace, health,
13 and safety.

1 a proposed plan for changing a point of diversion, the referee
2 or the water judge shall consider any depletions which would
3 result from such change and the effect of those depletions on
4 meeting any obligation for delivering water to any state
5 pursuant to an interstate compact. For purposes of this
6 subsection (12), interstate compacts are declared to be
7 matters of statewide concern.

8 SECTION 2. Effective date. This act shall take effect
9 July 1, 1986.

10 SECTION 3. Safety clause. The general assembly hereby
11 finds, determines, and declares that this act is necessary
12 for the immediate preservation of the public peace, health,
13 and safety.

BILL 57

A BILL FOR AN ACT

1 CONCERNING THE REMOVAL OF WATER FROM IRRIGATED LAND.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides that if the approval of a change of point of diversion will result in the removal of irrigation water from previously irrigated farmland, the applicant for such change must then certify that notice will be given to the local soil conservation district, to the board of county commissioners, and, if the applicant is not the landowner, to the landowner. Requires that such notice states the location of the land which will be left without irrigation water and the approximate year in which the transition will occur.

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. 37-92-302 (1) (a), Colorado Revised Statutes,
4 as amended, is amended to read:

5 37-92-302. Applications for water rights or changes of
6 such rights - plans for augmentation. (1) (a) Any person who
7 desires a determination of a water right or a conditional
8 water right and the amount and priority thereof, including a
9 determination that a conditional water right has become a

1 water right by reason of the completion of the appropriation,
2 a determination with respect to a change of a water right,
3 approval of a plan for augmentation, quadrennial finding of
4 reasonable diligence, or approval of a proposed or existing
5 exchange of water under section 37-80-120 or 37-83-104, or
6 approval to use water outside the state pursuant to section
7 37-81-101 shall file with the water clerk in quadruplicate a
8 verified application setting forth facts supporting the ruling
9 sought, a copy of which shall be sent by the water clerk to
10 the state engineer and the division engineer. IF THE APPROVAL
11 OF AN APPLICATION FILED UNDER THIS SECTION FOR A CHANGE OF USE
12 OR FOR A CHANGE OF POINT OF DIVERSION WILL RESULT IN THE
13 REMOVAL OF IRRIGATION WATER FROM PREVIOUSLY IRRIGATED FARMLAND
14 OR CROPLAND, THE APPLICANT SHALL CERTIFY THAT NOTICE OF THE
15 LOCATION OF THE LAND WHICH WILL BE LEFT WITHOUT IRRIGATION
16 WATER AND THE APPROXIMATE YEAR IN WHICH THE TRANSITION WILL
17 OCCUR HAS BEEN GIVEN TO THE LOCAL SOIL CONSERVATION DISTRICT,
18 TO THE BOARD OF COUNTY COMMISSIONERS, AND, IF THE APPLICANT IS
19 NOT THE LANDOWNER, TO THE LANDOWNER.

20 SECTION 2. Safety clause. The general assembly hereby
21 finds, determines, and declares that this act is necessary
22 for the immediate preservation of the public peace, health,
23 and safety.

BILL 58

A BILL FOR AN ACT

1 CONCERNING THE INVENTORY OF ALL POTENTIAL AND EXISTING DAM AND
2 RESERVOIR SITES BY THE COLORADO WATER CONSERVATION BOARD,
3 AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes an appropriation to the Colorado water conservation board to compile an inventory of all existing, proposed, and potential dam, conditionally decreed dam, and reservoir sites in the state of Colorado. Details the information to be included in the inventory. Requires the Colorado water conservation board to make said inventory available to the general assembly by a certain date.

4 Be it enacted by the General Assembly of the State of Colorado:
5 SECTION 1. 37-60-121, Colorado Revised Statutes, as
6 amended, is amended BY THE ADDITION OF A NEW SUBSECTION, to
7 read:
8 37-60-121. Colorado water conservation board
9 construction fund - creation of - nature of fund - funds for
10 investigations - contributions - use for augmenting the

1 general fund. (4.5) The Colorado water conservation board
2 shall compile an inventory which shall be available to the
3 general assembly on or before February 1, 1987, and which
4 shall include:

5 (a) The following information concerning all proposed
6 and potential dam and reservoir sites holding one thousand
7 acre-feet or more, including all dam sites conditionally
8 decreed:

9 (I) Pertinent data, acquired from a review of all
10 existing literature, reports, and other sources, on the:

11 (A) Proposed and potential dams;

12 (B) Potential firm yield of the reservoirs;

13 (C) Owners and potential owners of water rights;

14 (D) Owners and potential owners of the dams and
15 reservoirs.

16 (II) An engineer's estimate of design and construction
17 costs.

18 (b) The following information concerning all existing
19 dams and reservoirs holding one thousand acre-feet or more,
20 including pertinent data acquired from a review of all
21 existing literature, reports, and other sources, on the:

22 (I) Dams;

23 (II) Firm yield of the reservoirs;

24 (III) Owners of the dams and reservoirs;

25 (IV) Owners of the water rights.

26 SECTION 2. Appropriation. In addition to any other
27 appropriation, there is hereby appropriated, out of any moneys

1 in the general fund not otherwise appropriated, to the
2 Colorado water conservation board for allocation to the
3 Colorado water conservation board construction fund, for the
4 fiscal year commencing July 1, 1986, the sum of one hundred
5 thousand dollars, (\$100,000), or so much thereof as may be
6 necessary, for the implementation of this act.

7 SECTION 3. Effective date. This act shall take effect
8 July 1, 1986.

9 SECTION 4. Safety clause. The general assembly hereby
10 finds, determines, and declares that this act is necessary
11 for the immediate preservation of the public peace, health,
12 and safety.

BILL 59

A BILL FOR AN ACT

1 CONCERNING THE APPRAISED VALUE OF TIMBER SUBJECT TO
2 COMPETITIVE BIDDING REQUIREMENTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Raises the appraised value of timber on state land required to be advertised for competitive bidding.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 36-7-103, Colorado Revised Statutes, is
5 amended to read:

6 36-7-103. Disposition of timber on state lands. The
7 state board of land commissioners, referred to in this article
8 as the board, is authorized to sell and otherwise dispose of
9 timber on state lands; to secure the maximum possible amount
10 therefrom, based upon cruised and appraised quantities
11 thereon, location, accessibility, and market conditions; to
12 issue permits of authority for timber cuttings; and to require

1 cash deposits in advance to apply on such timber cutting
2 permits. In cases in which the appraised value of timber
3 involved in any proposed sale exceeds one FIVE thousand
4 dollars, competitive bids shall be received by the board,
5 after call for such bids has been advertised over a thirty-day
6 period in three issues of a newspaper of general circulation
7 in each county in which the timber is located.

8 SECTION 2. Safety clause. The general assembly hereby
9 finds, determines, and declares that this act is necessary
10 for the immediate preservation of the public peace, health,
11 and safety.

APPENDIX A INVENTORY OF STATE-OWNED LANDS ADMINISTERED BY STATE AGENCIES 1/

Executive Department 2/

County	Admin. 3/	Agric.	Correct.	Education	Health	High. Ed.	Highways 4/	Insti.	Lab./Emp.	Mili. Affr.	Nat. Res.	Revenue	Soc.Serv.	Total
Adams	N/A						22.38	7.00			557.49			586.87
Alamosa						97.00	0.06				40.00			137.06
Arapahoe						51.00	5.13			5.60				61.73
Archuleta							0.06				772.68			772.74
Baca							1.45				3039.31			3040.76
Bent							0.05			5.50	1581.16			1586.71
Boulder						768.30	1.52			10.40	806.10			1586.32
Chaffee			2010.00				0.38				1050.56			3060.94
Cheyenne							0.08							0.08
Clear Creek						76.43	37.11				3440.77			3554.31
Conejos						978.56	0.06				7578.24			8556.86
Costilla						63.70								63.70
Crowley							0.04							0.04
Custer							0.04							0.04
Delta						120.00	0.85				5102.44			5223.29
Denver	N/A	0.75				44.82	5.72	287.10	0.99	3.00		3.90	0.69	346.97
Dolores							0.20				5899.33			5899.53
Douglas							0.34				2375.06			2375.40
Eagle							161.05				8403.29			8564.34
Elbert							0.08							0.08
El Paso	N/A			33.00		637.00	3.25	7.00		15.00	110.61			805.86
Fremont			4719.00				0.06			0.40	2200.80		60.00	6980.26
Garfield							184.05		0.52		6768.34		5.42	9658.33
Gilpin						0.15	0.10				5290.00			5290.25
Grand							0.57				11,717.46			11,718.03
Gunnison						1763.00	4.58				8279.14			10,046.72
Hinsdale											2492.57			2492.57
Huerfano							0.22				1558.31			1558.53
Jackson						250.00	2.37	20.00			3041.45			3313.82
Jefferson						647.00	29.78	430.60		375.00	4858.59			6340.97
Kiowa											1909.10			1909.10
Kit Carson							4.27				368.63			372.90

1/ All Figures Expressed in Acreage. Excludes Lands Administered by the State Land Board.

2/ Three of the 20 Executive Departments (Law; Local Affairs, and Personnel) do not own any land.

3/ Land Holdings for the Department of Administration were not available in acreage.

4/ Figures do not Contain Highway Rights-of-Way.

APPENDIX A

Executive Department

County	Admin.	Agric.	Correct.	Education	Health	High. Ed.	Highways	Insti.	Lab./Emp.	Mili. Affr.	Nat. Res.	Revenue	Soc.Serv.	Total
Lake						0.64	0.12							0.76
La Plata						6318.00	32.16			1.40	13,613.80			19,965.36
Larimer						4366.00	0.41			5.00	25,609.92			29,981.33
Las Animas	N/A					31.48	0.11			1.70	13,517.00		15.50	13,565.79
Lincoln	N/A						0.37				2515.85			2516.22
Logan							0.36			1.40	15,059.93			15,061.69
Mesa	N/A	0.30			40.00	214.00	23.98	310.60		3.90	2027.23			2620.01
Mineral							0.28				601.38			601.66
Moffat							0.83		0.16	5.00	7386.61			7392.60
Montezuma							0.54			4.90	1057.97			1063.41
Montrose						7.75	6.61			1.60	9605.89			9621.85
Morgan						20.00	0.18			0.30	4183.06			4203.54
Otero	N/A					141.00	0.32			5.10	2753.66			2900.08
Ouray							0.13				4529.19			4529.32
Park							0.40				3164.73			3165.13
Phillips							12.57				226.59			239.16
Pitkin							5.39				330.00			335.39
Prowers	N/A					113.21	0.13			6.80	3228.27			3348.41
Pueblo		102.13	4213.00			1489.34	0.89	357.90	0.97	5.00				6169.23
Rio Blanco							0.15				47,294.56			47,294.71
Rio Grande						160.00	0.07		0.10	5.00	1120.14		472.00	1757.31
Routt							0.17				7093.50			7093.67
Saguache							0.17				1245.65			1245.82
San Juan							0.07							0.07
San Miguel							0.12				9792.23			9792.35
Sedgwick							0.13				1140.41			1140.54
Summit							30.39		0.40		111.15			141.94
Teller							0.16				13,217.37			13,217.53
Washington	N/A					3760.00	0.35				209.46			3969.81
Weld						382.24	49.69			5.00	1853.07			2290.00
Yuma							0.17				3190.94			3191.11
<u>Total</u>	N/A	103.18	10,942.00	33.00	40.00	22,500.62	633.27	1,420.20	3.14	467.00	284,920.99	3.90	553.61	

Grand Total]: 321,620.91 Ac



The State of Colorado

DEPARTMENT OF LAW

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November 18, 1985

Senator Tilman Bishop, Chairman
Committee on Water and Land Resource
Colorado State Senate
Senate Chambers
Colorado State Capital Building
Denver, Colorado 80203

RE: The constitutional and statutory relationship between the office of the executive director of the Department of Natural Resources and the Board of Land Commissioners relative to the implementation and formulation of administrative and policy matters affecting public lands.
AG Alpha No. LE SE AGAOQ
AG File No. ORL8505598/AOQ

Dear Senator Bishop:

This letter is in response to your letter of September 30, 1985, in which you request an attorney general's opinion regarding the constitutional and statutory relationship between the office of the executive director of the Department of Natural Resources (executive director) and the Board of Land Commissioners (Land Board) concerning the formulation and implementation of administrative and policy matters affecting public lands.

QUESTIONS PRESENTED AND CONCLUSIONS

Your request for an attorney general's opinion presents the following questions:

1. Is the type 1 delegation of authority over the State Board of Land Commissioners to the Department of Natural Resources, (sections 24-1-105, and 124(3)(d), C.R.S. (1982 and 1985 Supp.)), more limited than other type 1 transfers because of the constitutional creation of the board? See Colo. Const. art. IX, secs. 9

and 10.

My conclusion is yes.

2.a. Does the Department of Natural Resources have administrative control over the hiring and firing of State Land Board personnel, the determination of the number and types of positions required, and the organization of personnel?

My conclusion is no with respect to the hiring, i.e., the filling of vacancies, and firing of Land Board personnel and the types of positions required. My conclusion is yes with respect to the determination of the number of positions required. With respect to the organization of personnel, my conclusion is yes as to personnel performing functions not vested in the Land Board by statute or the constitution, but no as to personnel performing substantive functions vested in the Land Board by statute or the constitution.

2.b. Does the Department of Natural Resources have administrative control over the determination of office space and furniture requirements?

My conclusion is yes.

2.c. Does the Department of Natural Resources have administrative control over the determination of budgetary requirements?

My conclusion is yes.

2.d. Does the Department of Natural Resources have administrative control over the daily monitoring of personnel, including board members, to oversee numbers of hours worked and matters worked on?

My conclusion is no.

3.a. Do the board members accrue sick leave or annual leave?

My conclusion is no.

3.b. If board members do not accrue sick leave or annual leave, can they be required to maintain records of any sick leave or annual leave taken?

My conclusion is yes, if required by statute.

4. Does the Department of Natural Resources have authority to oversee or control policy decisions of the Land Board regarding the management of state trust land?

My conclusion is no.

5. Is the Land Board required to submit its decisions on policy to the department for approval?

My conclusion is no.

6. Is the Land Board required to explain its policy decisions to the department?

My conclusion is no.

7. Does the Department of Natural Resources have the authority to impose sanctions against the Land Board, such as withholding salary, for failing to follow the advice or requests of the department regarding policy decisions?

My conclusion is no.

8. Does the Department of Natural Resources have the authority to impose sanctions against the Land Board for failing to comply with its administrative directives?

My conclusion is no; that authority rests with the Governor.

10.a. Does the requirement that the State Board of Land Commissioners "provide for the location, protection, sale or other disposition" of public lands "in such a manner as will secure the maximum amount therefore" (Colo. Const. art. IX, sec. 10) prevent the Land Board from considering public interest factors in its management and leasing of the public lands?

My conclusion is no.

10.b. May the Land Board open grazing leases to hunting and fishing so long as it does not result in lowering rents received from the land?

Senator Tilman Bishop
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My conclusion, as to current leases, is that it would depend upon the terms of the individual lease. As to future leases, my conclusion is yes.

10.c. If the Land Board is developing a subdivision, may it exceed local planning and zoning requirements in setting aside open space, parks and public use area?

My conclusion is yes, provided that it would be consistent with the constitutional mandate that it "will secure the maximum possible amount therefor."

10.d. May the board adopt a multiple-use management policy like that of the federal public land management agencies?

My conclusion is yes.

ANALYSIS

The State Board of Land Commissioners was created by art. IX, sec. 9 of the original state constitution, which was adopted by the territorial constitutional convention on March 14, 1876, and ratified by the territorial electorate at an election held on July 1, 1876. The General Statutes of the State of Colorado 1883, pp. 32-83.

The Department of Natural Resources and the office of the executive director were created in 1968 as part of the "Administrative Organization Act of 1968." 1968 Colo. Sess. Laws 88. In the "Administrative Organization Act of 1968," the general assembly, pursuant to the mandate of art. IV, sec. 22 of the state constitution, allocated all executive and administrative offices and agencies in the executive branch of state government to 17 principal departments. 1968 Colo. Sess. Laws 75-76.

As part of the administrative organization of the executive branch, the Land Board was allocated to the newly created Department of Natural Resources as a division thereof and transferred to it by a type 1 transfer. 1968 Colo. Sess. Laws 89. The allocation was made in the following words:

(3)(a) The department of natural resources shall consist of the following divisions:

....

(e) The state board of land commissioners, created by section 9 of article IX of the state constitution, and its powers, duties, and functions, are transferred by a type 1 transfer to the department of natural resources as a division thereof, subject to the state constitution.

Id. (Emphasis partly added.)

The general assembly, by the addition of the words "subject to the state constitution" clearly indicated that the allocation of the Land Board and the transfer of its powers, duties, and functions to the department were subject to the higher mandate of the state constitution. See for comparison all other type 1 transfers within the Department of Natural Resources. None contains this explicit qualification. Thus, as stated above in my conclusion to question No. 1, the type 1 transfer of the Land Board to the department is more limited than other type 1 transfers. The scope of this limitation, of course, is dictated by the provisions of secs. 9 and 10 of art. IX of the state constitution.

Art. XII, sec. 13(7) of the state constitution provides that the heads of divisions shall be the appointing authorities for all positions in the state personnel system within their respective divisions. To the same effect, see section 24-1-108, C.R.S. (1982). Section 24-1-108, however, states that all appointments shall be made in accordance with section 24-2-102, C.R.S. (1982). Subsection (1) of section 24-2-102 provides that all officers, assistants and employees as may be necessary in each principal department shall be appointed by the head of such department. Subsection (1) of section 24-2-102 is itself qualified by the phrase: "Except as otherwise provided by law...." The apparent facial inconsistency between section 24-1-108 and subsection 24-2-102(1) is resolved by me in favor of the interpretation that the head of a division is the appointing authority for all positions within the division which are in the state personnel system. This resolution is based upon two premises. First, the state constitution, to the extent it is not in conflict with the federal constitution, is the paramount law of the state. Art. XII, sec. 13(7) of the state constitution provides in clear and unambiguous terms that "heads of such divisions shall be the appointing authorities for all positions in the personnel system

within their respective divisions." Second, the applicable part of subsection 24-2-102(1) is qualified by the phrase: "Except as otherwise provided by law...." Art. XII, sec. 13(7) so provides otherwise.

As discussed above, the Land Board was transferred to the Department of Natural Resources as a division thereof. Section 24-1-124(3)(d). It is my opinion, in answer to question No. 2.a. that the "hiring and firing," i.e., the appointment or termination, of Land Board personnel within the state personnel system rests with the Land Board as head of the division and thus as the appointing authority under the rules and regulations of the Colorado state personnel system.

This conclusion is consistent also with the provisions of subsection 36-1-102(1), C.R.S. (1982), which provides that the Land Board "is authorized to employ, pursuant to section 13 of article XII of the state constitution, an office force." It is also consistent with section 36-1-111, C.R.S. (1982) to the effect that the Land Board "shall appoint, pursuant to section 13 of article XII of the state constitution, such appraisers of state lands as are necessary. The appraisers shall be under the direction of the state board of land commissioners." See also section 36-1-138, C.R.S. (1982) (which authorizes the Land Board to establish a mineral section and appoint a superintendent of same).

Since it is the responsibility of the Land Board, as the appointing authority, to appoint or terminate classified personnel within the division, it is my opinion, in response to that portion of question No. 2.d. concerning employees of the division, that the daily monitoring of such personnel to oversee the number of hours worked and matters worked on rests with the Land Board.

Subsection 24-1-105(1), C.R.S. (1982), as it originally appeared in the "Administrative Organization Act of 1968" read as follows:

Under this act, a type 1 transfer means the transferring intact of an existing department, institution, or other agency, or part thereof, to a principal department established by this act. When any department, institution, or other agency, or part thereof, is transferred to a principal department under a type 1 transfer, that department, institution, or other agency, or

part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise its prescribed statutory powers, duties and functions, including rule-making, regulation, licensing, and registration, and the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications independently of the head of the principal department. Under a type 1 transfer, all budgeting, purchasing, and related management functions of any transferred department, institution, or other agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

1968 Colo. Sess. Laws 74. In 1973, the last sentence quoted above was amended by the insertion of the phrase: "any powers, duties, and functions not specifically vested by statute in the agency being transferred, including but not limited to." 1973 Colo. Sess. Laws 187. The last sentence was amended again in 1974 by the addition of word "planning" so that the last sentence now reads:

Under a type 1 transfer, any powers, duties, and functions not specifically vested by statute in the agency being transferred, including, but not limited to, all budgeting, purchasing, planning, and related management functions of any transferred department, institution, or other agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

1974 Colo. Sess. Laws 202.

Thus, according to subsection 24-1-105(1) as it exists today, a type 1 agency exercises its prescribed statutory powers, duties and functions independently of the head of the principal department; however, as to powers, duties and functions not specifically vested by statute in the type 1 agency, such powers, duties and functions are performed under the direction and supervision

of the head of the principal department. With respect to budgeting, purchasing, planning and related management functions, such are to be exercised by a type 1 agency under the direction and supervision of the head of the principal department. Powers, duties and functions not specifically vested in a type 1 agency, and budgeting, purchasing, planning and related management functions, may be reallocated by the head of a principal department, with the approval of the Governor, to other divisions, sections and units within the principal department. Section 24-1-107, C.R.S. (1982). However, powers, duties and functions vested by statute in a type 1 agency may not be removed by the head of the principal department from that type 1 agency. Id. Thus, not only are prescribed statutory "powers, duties, and functions, including rule-making, regulation, licensing, and registration, the promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications," to be performed by a type 1 agency independently of the head of the principal department, but they may not be removed by the head from such agency and allocated to another division, section or unit within the principal department.

Specifically with respect to the Land Board and the department, the Land Board was transferred to the department in 1968 pursuant to a type 1 transfer. 1968 Colo. Sess. Laws 89. As discussed above, the type 1 transfer was made subject to the state constitution. See also section 24-33-104(1)(c), C.R.S. (1982).

In defining the relationship between the Land Board and the department, it is necessary also to consider secs. 9 and 10 of art. IX of the state constitution. In sec. 9 of art. IX, "the direction, control and disposition of the public lands of the state" is vested in the board "under such regulations as are and may be prescribed by law...." In sec. 10 of art. IX, it is made the duty of the Land Board:

to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor.

Completing the questions you asked in question No. 2.a., it is my

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opinion that the department head has administrative control over the Land Board's determination of the number of positions required in the division; this under the department head's authority to oversee budgeting and planning for the department as a whole. With respect to the remaining portion of question No. 2.a., i.e., the organization of personnel in the division (Land board), the department head's administrative control turns upon whether the personnel in question are performing functions of the Land Board that are specifically vested or not specifically vested in the board by statute or the constitution. If the personnel are performing functions specifically vested in the Land Board by statute or the constitution, then the department head does not have administrative control over the organization of the affected personnel. That control rests with the Land Board. See analysis above as to subsection 24-1-105(1) and section 24-1-107. See also my opinion, dated June 15, 1984, to Mr. David H. Getches, executive director of the Department of Natural Resources.

If, on the other hand, the functions being performed by the affected personnel are not specifically vested in the Land Board by statute or the constitution, then the department head has administrative control over the organization of the affected personnel.

In question No. 3.a. you have inquired whether members of the Land Board accrue sick leave or annual leave, and in question No. 3.b. you have asked if such members do not accrue sick or annual leave, whether they can be required to maintain records of such leave that is taken. Annual leave is a form of compensation. Bruce v. City of St. Louis, 217 S.W.2d 744, 748 (Mo. App. 1949). The same may be said of sick leave. A state officer is entitled to compensation, emoluments, fees, costs, expenses, mileage, etc., if such is provided for by statute. McGovern v. City and County of Denver, 54 Colo. 411, 131 P. 273 (1913); Leckenby v. Post Printing and Publishing Co., 65 Colo. 443, 176 P. 490 (1918). The position of state land board commissioner is that of a state officer, as opposed to a state employee. Cf. Corfman v. McDevitt, 111 Colo. 437, 142 P.2d 383 (1943). I have found no statute which provides that members of the Land Board accrue either sick leave or annual leave. The general assembly, however, could require land board commissioners to keep records of time not spent performing their duties as commissioners.

In question No. 4, you have inquired: "Does the Department of

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Natural Resources have any authority to oversee or control policy decisions of the State Land Board regarding the management of state trust land?" From my analysis of the "Administrative Organization Act of 1968" and secs. 9 and 10 of art. IX of the state constitution, my conclusion is that the head of the department does not have any such authority.

It is specifically provided in subsection 24-1-105(1) of the "Administrative Organization Act of 1968" relating to type 1 transferred agencies that prescribed statutory powers, duties and functions shall be exercised independently of the head of the principal department. The management of state trust land, the constitution aside, is vested in the Land Board by statute. See, e.g, sections 36-1-105, 36-1-107, 36-1-108, 36-1-109, 36-1-113, 36-1-114, 36-1-115, 36-1-118, 36-1-120, 36-1-122, 36-1-123, 36-1-124, 36-1-125, 36-1-127, 36-1-129, 36-1-136, 36-1-137, 36-1-138, 36-1-141 and 36-1-144, C.R.S. (1982 & 1984 Supp.).

This conclusion is not inconsistent with the interpretation given to secs. 9 and 10 of art. IX by the Colorado Supreme Court. In Sunray Mid-Continent Oil Company v. State, 149 Colo. 159, 368 P.2d 563 (1962), the court held that the Land Board could not be required to share management control with the State Board of Agriculture over the lands at the Fort Lewis School which had been granted to the state by the federal government. As stated by the court: "The Land Commissioners alone have the constitutionally imposed duty to provide for the '... sale or other disposition' of such lands, 'under such regulations as may be prescribed by law.'" 149 Colo. at 164-165. (Emphasis added.) To the same effect, see in Re Canal Certificates, 19 Colo. 63, 34 P. 274 (1893). In short, the Land Board may not be required to share management control over state trust lands with the head of the department, let alone subordinate management control.

In question No. 5 you inquire: "Is the State Land Board required to submit its decisions on policy to the Natural Resources Department for approval?" My conclusion is that the Land Board is not for the reasons stated above. As a type 1 agency, it exercises its prescribed statutory powers, duties and functions independently of the head of the department. As such, it is not required to submit its decisions on policy affecting public lands to the head of the department for approval. Furthermore, by the constitution, the Land Board alone, under regulations prescribed by the general assembly (statutory law), determines policy as it affects public lands. Sunray Mid-Continent Oil Company v. State,

supra; In re Canal Certificates, supra.

You inquire in questions No. 6: "Is the State Land Board required to explain its policy decisions to the Natural Resources Department"? My conclusion is that the Land Board is not required to explain policy decisions to the head of the department. If the Land Board is not required to submit its policy decisions to the head of the department for approval because such decisions are to be performed independently of the head of the department, then it follows that it is not required to explain such decisions to the head of the department. However, I assume that the Land Board does communicate with the department head to inform him as to the board's management of state public lands, if for no other reason than department budgeting, planning and purchasing as they relate to the board.

In question No. 7, you inquire: "Does the Natural Resources Department have the authority to impose sanctions against the State Land Board, such as withholding salary, for failing to follow the advice or requests of the Natural Resources Department regarding policy decision?" My conclusion is that the department head may not impose sanctions. It follows that if the department head does not have authority to oversee or control policy decisions of the Land Board, and the Land Board is not required to submit its policy decision to the department head for approval, or to explain them, then the department head has no authority to impose sanctions against the board for failing to follow the department head's advice or requests regarding policy decisions.

In question No. 8, you inquire: "Does the Natural Resources Department have the authority to impose sanctions against the Land Board for failing to comply with its administrative directives?" My conclusion is that the department head does not have such authority. However, sanctions in the form of removal may be imposed against Land Board members by the Governor if failure to comply with the administrative directives of the department head would constitute incompetency, neglect of duty or malfeasance in office.

Art. IX, sec. 9 of the state constitution provides in part:

The state board of land commissioners shall be composed of three (3) persons to be appointed by the Governor, with the consent of the senate ... and the successor or suc-

cessors of the first members of the board shall each be appointed for terms of six (6) years.

Art. IV, sec. 6(1) of the state constitution provides, in part:

The Governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution ... and may remove any such officers for incompetency, neglect of duty, or malfeasance in office.

Since the offices of the Land Board Commissioners are created by art. IX, sec. 9 of the state constitution, People v. Field, 66 Colo. 367, 372, 181 P. 526 (1919); In re Questions by the Governor, 55 Colo. 105, 106, 133 P. 140 (1913); they are constitutional offices. People v. Field, *supra*. The commissioners are appointed by the Governor, with the consent of the senate. Art. IX, sec. 9. As such, the authority to impose sanctions against members of the Land Board rests with the Governor, not the head of the Department of Natural Resources. Cf. Roberts v. People ex rel. Hicks, 77 Colo. 281, 235 P. 1069 (1925).

In question No. 10 you asked several subquestions.

First you inquire: "Does the requirement that the State Board of Land Commissioners 'provide for the location, protection, sale or other disposition' of the public lands 'in such manner as will secure the maximum amount therefor' (Colorado Const. art. IX, sec. 10) prevent the Board from considering public interest factors in its management and leasing of the public lands." You give as an example, would it be possible for the Land Board to give preference to public entities if such public entities bid as much as a private bidder.

Sections 9 and 10 of art. IX impose two general restraints upon the discretion of the Land Board in its "direction, control and disposition of the public lands of the state." First, the Land Board's discretion is to be exercised subject to "such regulations as are or may be provided by law," and second, in "such manner as will secure the maximum possible amount therefor." In In re Leasing of State Lands, 18 Colo. 359, 364, 32 P. 986 (1893), the supreme court wrote:

Therefore, in leasing state lands, the board must first look to the statutes to ascertain the regulations therein prescribed, and then, in exercising their constitutional powers, they must so act as in the judgment of the board will secure the maximum amount, under the prescribed regulations.

Immediately prior in its opinion the supreme court defined the word "regulations" as used in secs. 9 and 10 of art. IX to mean such "reasonable rules as may be prescribed from time to time, by the legislative department of the government." Id. In Evans v. Simpson, 190 Colo. 426, 430, 547 P.2d 931 (1976), the supreme court wrote of secs. 9 and 10 of art. IX:

In our view, the constitution mandates that, unless limited by express statutory regulations, the Board shall enter into whatever leases it deems to be most beneficial to the state. It may therefore utilize any lease terms not prohibited by law ... to obtain maximum revenues.

I have reviewed the Colorado Revised Statutes as it applies to the Land Board and find no specific statutory prohibition against the Land Board taking public interest factors into consideration in the management and leasing of public lands, if such does not result in the state securing less than the maximum amount.

You also inquire in question No. 10: "Could the Board open grazing leases to hunting and fishing, so long as it did not result in lowering rents received from the land?" With respect to existing grazing leases, it would depend upon the terms of the lease. With respect to future leases for grazing, the Land Board has discretion to reserve the right to open such leased public lands for hunting and fishing. Cf. Evans v. Simpson, supra.

You next inquire in question No. 10: "If the Board is developing a subdivision, may it exceed local planning and zoning requirements in setting aside open space, parks and public use areas?" Once again I find no specific statutory prohibition. Thus, if in the judgment of the Land Board, exceeding local planning and zoning requirements for open space, parks and public use areas would not result in the state receiving less than the maximum amount

from the development of the subdivision, this would be within the board's authority. Id.

Finally, in question No. 10 you inquire: "May the Board adopt a multiple-use management policy like that of the federal public land management agencies?" Once again, I find no specific statutory prohibition against such a multiple-use management policy.

SUMMARY

The Land Board was transferred to the Department of Natural Resources under the "administrative Organization Act of 1968," by a type 1 transfer, which transfer was made specifically to article IX, sections 9 and 10 of the state constitution. Under a type 1 transfer, the Land Board exercises its statutory and constitutional powers, duties and functions independently of the head of the department, and such statutory and constitutional powers, duties and functions may not be transferred by the department head to any other division, section or unit within the department. With respect to powers, duties and functions not vested in the Land Board by statute or the constitution, such powers, duties and functions, and budgeting, purchasing, planning and related management functions they are to be performed by the Land Board under the direction of the department head, and may be transferred by him, with the approval of the Governor, to other divisions, sections or units within the department.

Pursuant to article XII, section 13(7) of the state constitution, the Land Board is the appointing authority for all positions within the division that are in the state personnel system. Thus, the appointment, discipline and termination of such personnel rests with the Land Board. However, the determination of the number of positions within the Land Board, rests with the department head.

Land Board commissioners are appointed by the Governor, with the consent of the senate, pursuant to article IX, section 9 of the state constitution. As such, authority rests with the Governor, not the department head, under article IV, section 6(1) of the state constitution to impose sanctions against board members for incompetency, neglect of duty or malfeasances in office.

Article IX, sections 9 and 10 impose two restraints on the Land Board's management of state lands. These restraints are that

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management is subject to regulations adopted by the general assembly and that the sale or other disposition of state lands must secure the maximum possible amount. Unless specifically so restricted, the Land Board may sell, dispose of, or manage state lands as the board deems most beneficial to the state. Since it has not been so restricted, the board may open future grazing leases to hunting and fishing, to exceed local zoning for open space unless this will not return to the state the maximum amount therefore, and adopt multiple use of state lands.

Very truly yours,
Duane Woodard

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Attorney General

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