

WATER

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Approval Process

Water Supply Planning

SB 13-258 (*Enacted*)
Stages In Development Permit
Approval Process

Water Quality Issues

HB 13-1044 (*Enacted*)
Authorize Graywater Use

During the 2013 legislative session, the Colorado legislature considered a broad range of water bills. Specifically, it addressed water issues related to groundwater use and protection, funding for water projects, and water efficiency and reuse.

Water Rights Determination and Administration

The General Assembly considered several bills that address how a landowner may control the use of water that is obtained from his or her land and determine how a water rights owner may use his or her water.

Water ownership rights. The U.S. Forest Service recently changed the terms of its special use permits for ski areas by issuing a directive that prohibits ski area operators from transferring certain water rights associated with the ski area to any third parties. The directive also required that,

if the special use permits are terminated, the ski area operators must transfer certain water rights associated with the ski area to the United States or succeeding special use permit holders without any further compensation. The directive was challenged in federal court and has since been withdrawn by the U.S. Forest Service. As introduced, **House Bill 13-1013**, recommended by the Water Resources Review Committee, would have prohibited a landowner from demanding that the owner of a water right assign to the landowner either partial or joint ownership of the water right as a condition of granting a right-of-way or special use permit, and specified that a court cannot order as a condition of an eminent domain proceeding that a water right or conditional water right owner assign to the landowner partial or joint ownership of the water right or limit the alienability of the water right. Such condition would have been void and unenforceable as against public policy. The bill was deemed lost.

Increased flexibility in the use of water. Interruptible water supply agreements (IWSA) enable water users to transfer a portion of their water right, called the historical consumptive use, to another water user on a temporary basis, without permanently changing the water right. Under current law, for one ten-year period affecting a current water right, the state engineer is authorized to approve IWSAs that permit a temporary change in point of diversion, location of use, and type of use of a water right, without the need for an adjudication. **House Bill 13-1130** allows a water right owner with an IWSA to request up to two additional ten-year periods for the IWSA. The bill prohibits the State Engineer from renewing an IWSA that would transfer water across the Continental Divide. It also imposes additional notification requirements for IWSA applicants to enable potentially affected water users to comment on the IWSA, and it specifies criteria for IWSA to meet in order for the State Engineer to approve it.

House Bill 13-1248 authorizes the Colorado Water Conservation Board (CWCB) to approve up to ten pilot projects that temporarily transfer agricultural water rights in the South Platte, Arkansas, Rio Grande, and Colorado River Basins to municipal water users. No more than three pilot projects may be located in the same river basin. The CWCB must consult with the State Engineer's Office (SEO) when selecting project sponsors. Projects may last up to ten years. The purpose of the pilot projects is to demonstrate how to lease water from fallowed agricultural land for temporary municipal use without injuring other water rights. The CWCB is prohibited from selecting projects that fallow the same land for more than three years in a ten-year period, fallow more than 30 percent of a single irrigated farm for more than ten consecutive years, or transfer water across the Continental Divide or out of the Rio Grande Basin. Projects must also comply with interstate compacts, meet local government land use requirements, prevent erosion, and comply with local weed management regulations. The act also provides an opportunity for potentially affected water users to comment on proposed pilot projects. Water users who believe they may suffer injury from a pilot project may appeal the CWCB decision to the Water Court within 35 days after the CWCB's notice of decision has been mailed.

Some water users may wish to reduce their water consumption in order to limit the effects of drought on stream flows. However, under current law there is a disincentive that penalizes appropriators who decrease their consumptive use of water. **Senate Bill 13-019** restricts a water judge from determining a water user's historical consumptive use based on water use reductions resulting from the enrollment in a federal land conservation program; participation in certain water conservation programs; participation in an approved land fallowing program or to provide water for compact compliance; or participation in a water banking program. The act is limited to water users in the Colorado, Gunnison, and White River Basins in western Colorado.

To manage the state's inconsistent water supply, over 2,000 dams and reservoirs have been constructed throughout the state. In 2011, the Colorado Supreme Court held that storage of water is not a beneficial use, at least where flood control and fire or drought protection are not the stated

uses of the water, and that to perfect a conditional storage right, the water must be released from storage and put to beneficial use. Further, an applicant must show that it has exhausted its absolute storage rights before its conditional storage rights can be perfected. **Senate Bill 13-041** expands the term "beneficial use" to include the impoundment of water for firefighting or storage for any lawful purpose, and further specifies that a system with multiple water storage features may be granted an absolute water storage right without evidence of full utilization of all component water rights. A water storage right must be made absolute for the volume that has been captured at the decreed storage structure. The act also specifies that a water right is not abandoned when the water is in long-term storage.

Since 1937, all irrigation water rights in Colorado included in their decree a specific maximum amount of acreage to which the water right could be applied. State law governing water rights requires agricultural users to designate acreage to be irrigated by a given water right, but statute does not currently provide a mechanism for determining the amount of acreage available to pre-1937 water rights that lack a decreed amount. In some cases, the courts have interpreted pre-1937 water rights to provide for less irrigated acreage than the amount historically irrigated by that water right. The Water Resources Review Committee recommended **Senate Bill 13-074** which establishes a mechanism to determine the amount of irrigated acreage available to a pre-1937 water right. Under the bill, the maximum amount of acreage irrigated during the first 50 years following the original decree is the amount of acreage available to a water right where such acreage has not already been determined in an adjudication.

A number of water rights in Colorado are affected by erroneous location descriptions for the point of diversion. These erroneous descriptions are the result of clerical errors, changes in landmarks or survey methods, and minor inaccuracies. Under current law, if the owner of a water right uses a point of diversion other than that which is described in the adjudicated decree, the owner must apply to the water court for a change of water right. The Water Resources Review Committee recommended **Senate Bill 13-078**, which clarifies the circumstances under which a water right is deemed to be diverted at its decreed location and not erroneously described. Erroneously described points of diversion that are the result of a clerical error may be corrected by petitioning the water clerk up to three years after the diverter becomes aware of the mistake. The bill also sets forth a process for correcting erroneously described points of diversion not attributable to a clerical error.

Groundwater Use and Protection

Oil and gas in Colorado is frequently associated with geological formations that also include groundwater. This groundwater must be pumped to the surface in order to obtain the oil and gas. **House Bill 13-1018** would have authorized the Solid and Hazardous Waste Commission in the Department of Public Health and Environment (DPHE) to regulate the beneficial use of groundwater produced during oil and gas operations (produced water) for dust suppression on unpaved roads in rural areas. The bill would have required the commission to promulgate a regulation with standards for the use of such water. The standards would have been required to prevent the discharge of pollutants into state waters and minimize the public's exposure to naturally occurring radioactive material contained in produced water, the maximum concentration of which would not have been allowed to exceed the federal Environmental Protection Agency's standard for soil application. The bill was postponed indefinitely.

There are few rivers in eastern Colorado, but there are large ground water resources that are important to agriculture and eastern municipalities. Wells are the primary source of water used in this area. To administer these wells, the law allows the formation of designated ground water basins that are regulated according to a modified doctrine of prior appropriation. Some irrigators

in designated basins want to reduce ground water withdrawals by shutting off part of their irrigation system that uses more water. Under current law, taking such action may impact an owner's ground water right. Specifically, the amount of water that can be changed to a new type or place of use is limited by the amount of water that was historically consumed by the original type and place of use. Consequently, conserving water may risk devaluation of a water right. The Water Resources Review Committee recommended **Senate Bill 13-075**, which specifies that once the State Engineer issues a final permit for the withdrawal of designated ground water, a reduction in the amount of water used pursuant to the permit due to the conservation of water is not grounds to reduce the maximum annual volume of the appropriation, the maximum pumping rate, or the maximum number of acres that have been irrigated.

Funding for Water Projects

The Colorado Water Quality Control Act requires that the Water Quality Control Commission (WQCC) develop and maintain a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state. In 2012, the WQCC amended its regulation concerning basic standards and methodologies for surface water to address nutrients. It also adopted a new nutrients management control regulation that establishes effluent limitations for domestic wastewater treatment plants and other wastewater dischargers that use active treatment and are likely to have significant levels of nutrients in their discharges. **House Bill 13-1191**, recommended by the Capital Development Committee, establishes the Nutrients Grant Fund, to be administered by the DPHE to assist local governments that operate wastewater treatment facilities with planning, design, construction, and other improvements necessary for compliance with recently-adopted nutrient management control regulations. The bill also appropriates \$15 million from the General Fund to the Nutrient Grant Fund. The WQCC must adopt rules to administer the fund, including a means of prioritizing grants to local governments that are the least financially capable of complying with nutrient regulations.

Each year, the WQCC, the Colorado Water Resources and Power Development Authority, and the Division of Local Government in the Department of Local Affairs prepare a list of projects that are eligible for loans from the Water Pollution Control Revolving Fund and the Drinking Water Revolving Fund. The lists are approved annually by the WQCC. The projects on the eligibility list are then included in an annual joint resolution that is considered by the General Assembly. Once the joint resolution is approved, the Colorado Water Resources and Power Development Authority may issue loans for public drinking water and waste water projects. **House Joint Resolution 13-007** includes the 2013 Project Eligibility List for the Water Pollution Control Revolving Fund that identifies 392 projects with an estimated cost of \$4.9 billion. The resolution also includes the 2013 Project Eligibility List for the Drinking Water Revolving Fund that identifies 432 projects with an estimated cost of \$3.3 billion.

The Colorado Water Conservation Board (CWCB) Construction Fund is a revolving loan program to fund projects that increase the consumption of Colorado's undeveloped river entitlements and that repair and rehabilitate existing water storage and delivery facilities. The fund receives revenue from the repayment of loans, interest, and federal mineral royalty distributions. **Senate Bill 13-181** appropriates \$32.3 million from the CWCB Construction Fund for a variety of water-related projects. Table 1 lists the projects funded by the CWCB Construction Fund.

Table 1

CWCB Construction Fund Projects	Amount FY 2013-14
Satellite Monitoring System Maintenance (Div. of Water Resources)	300,000
Weather Modification Program	175,000
Floodplain Map Modernization Program	500,000
Watershed Restoration Program	250,000
Flood Preparedness and Response	300,000
Rio Grande Water Supply Forecasting	215,000
Colorado's Decision Support System	100,000
Continuation of the Colorado River Availability Study	75,000
Arkansas Decision Support System	250,000
Update Statewide Water Supply Initiative	22,500
South Platte Groundwater Level Data Collection and Analysis	250,000
Windy Gap Reservoir Bypass Channel Project	2,000,000
Chatfield Reservoir Reallocation Project	28,000,000
TOTAL	\$32,340,000

Water Supply Planning

Under current law, a local government may not approve an application for a development permit unless it determines that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate. The term "adequate" is defined to mean a water supply that will be sufficient for build-out of the proposed development in terms of quality, quantity, dependability, and availability. A local government is permitted to make the adequacy determination only once during the development permit approval process. **Senate Bill 13-258**, enacted, modifies the definition of the term "development permit" to clarify that each application included in the definition constitutes a stage in the development permit approval process.

Water Quality Issues

Graywater use. Most water in Colorado may only be used once. Any water that is not consumed by a beneficial use must be allowed to return to the stream system for use by other water rights. **House Bill 13-1044** authorizes the WQCC to promulgate a regulation with standards for the use of graywater. Graywater is defined by the bill as wastewater collected within a building from

sources other than toilets and urinals, kitchen sinks, dishwashers, and nonlaundry utility sinks. Following the promulgation of a rule governing graywater use, counties and municipalities may adopt local legislation to allow graywater use. Where local graywater use is allowed, the governing body of the county or municipality must consult with the local board of health, local public health agencies, and any water and sanitation service providers serving the county, and must also provide for local enforcement of the state regulation. Graywater treatment works, as defined in the bill, are added to the rulemaking purview of groundwater management districts. Graywater use is limited to applications that are within the uses allowed under the well permit or water right of the original source or sources of the water.