

Important water bill clears Colorado Senate

Written by Marianne Goodland, State Capitol reporter

The “most important water bill” in a decade has cleared the Senate and is next up in the House Agriculture, Livestock and Natural Resources Committee this week.

SB 74 came out of the Interim Water Resources Review Committee in September, and got a 34-1 vote from the Senate on Feb. 20, where Sen. Greg Brophy (R-Wray) called it the most important water bill in a decade. The bill intends to clear up ambiguous language regarding water decrees put into place prior to Jan. 1, 1937.

SB 74 would affect decrees that are silent on the maximum amount of irrigated acres. The bill creates a mechanism for determining the maximum number of irrigated acres, to be based on the amount irrigated in the first 50 acres after the decree was issued.

According to State Water Engineer Dick Wolfe, there are 16,337 water decrees statewide issued prior to Jan. 1, 1937. He said he could not determine how many would be affected by SB 74 without reviewing each one individually.

The bill stems from concerns over Colorado Supreme Court decisions involving the Jones irrigation ditch (Greeley) and Burlington irrigation ditch (Adams and Weld counties). In the Jones case, the court ruled that while farmers had been irrigating 700 to 900 acres for generations, the original intent was to irrigate only about 300 acres. In the Burlington case, the original intent was to irrigate only above Barr Lake, although the ditch had been using water flowing below the lake as well.

The Senate Agriculture, Natural Resources and Energy Committee heard testimony on SB 74 last month, including support from several ditch companies. According to Attorney Andy Jones, representing the Legacy Ditch Association, the court rulings created uncertainty for farmers and ditch companies and fears that senior water rights would be reduced.

It’s an important issue for farmers, he said, who depend on those water rights for irrigation and to determine the value of their farm assets for inheritance and other financial transactions.

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SB 74 was opposed by the Colorado Water Congress. Attorney Steve Simms, representing the CWC, said the bill was unnecessary and wouldn't solve the problem. It also wouldn't apply retroactively to the Jones or Burlington cases.

Simms, who was the lead counsel in the Burlington case, explained that the case was based on the legal location of the use of water, which he said SB 74 doesn't address. In 95 percent of the cases brought to water court, the original decree should be sufficient.

"The normal rule is that you go back to see what original farmer asked for," Simms said. Look at the original claim, which shows how much water the farmer wants, here's what he'll do with it, and the judge figures out the legal area of use, a system Simms said has worked for 100 years. "A bill designed to say maximum use doesn't solve the question."

In other news from the capitol:

Rep. Jerry Sonnenberg (R-Sterling) became the first House Republican to see a new law passed by the 2013 General Assembly and signed into law by Governor John Hickenlooper.

Sonnenberg's House Bill 13-1034, which allows commodities warehouses to issue electronic receipts, raced through the Senate in the past two weeks. Under sponsor Sen. Angela Giron, D-Pueblo), HB 1034 sailed through the Senate Agriculture, Natural Resources and Energy Committee on Feb. 14 and got unanimous support from the Senate on Feb. 20. The governor signed it on Feb. 27.

One previous bill sponsored by a Republican was signed into law by the governor last week, but it is a standard bill that enacts the previous year's laws and is passed by the General Assembly every year.

In other action at the capitol:

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Sen. Mary Hodge (D-Brighton) has thrown out her original bill to grant eminent domain rights to oil companies and has started over, but the new bill picked up more opposition. SB 21 claimed that it would simply make a technical correction to a 19th-century statute regarding the authority of pipeline companies to obtain rights-of-way for new pipelines.

The original bill stated that its intent was to overturn a 2012 decision by the Colorado Supreme Court over alleged eminent domain and condemnation rights by oil companies. SB 21 would have granted those rights to oil companies.

The original bill has since been scrapped, and on Feb. 22, Hodge introduced a new bill, SB 191, which adds oil, petroleum and hydrocarbon to the types of pipelines and companies that can exercise eminent domain rights.

The bill quickly moved to the Senate Local Government Committee for a Tuesday, Feb. 26 hearing. But that's where the bill got more opposition, this time from irrigation ditch companies throughout northeastern Colorado.

Attorney Michael Shimmin, who represents the Bijou Irrigation Company, said SB 191 raises concerns for ditch companies that grant pipeline companies permission to cross irrigation ditches. Under a 2001 legal decision, *Roaring Fork v. St. Jude*, ditch companies have the right to deny pipeline crossings unless there is an agreement between the pipeline company and the ditch company.

However, in the past year, Shimmin said, oil and gas companies feel they no longer need the agreement of the ditch company. In January, Shimmin obtained a temporary restraining order in Weld District Court against Kerr McGee Gathering, which attempted to cross the Bijou ditch without permission.

Committee members frequently asked witnesses in the Feb. 26 hearing whether their local county or city governments had ever participated in the process, through granting special use permits. "We're on our own," said Shimmin. Other witnesses also testified that their local governments were never involved in the process.

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Much of the concern over how pipelines dig under ditches stems from an incident in 2008, when a gas pipeline went 20 feet under the North Sterling ditch. The ditch was full of water at the time, and although the ditch company believed 20 feet would be a safe depth, the ditch collapsed and emptied itself, and the ditch company lost water for three weeks.

After that, Shimmin testified, the ditch companies changed their crossing agreements to make sure no crossings took place while the ditch was full of water. Most ditches are dry at least half of the year, so there is ample opportunity for crossings when the ditch is empty, he said.

The prospect that SB 191 would grant oil companies the right to put in pipelines whenever they want to “terrifies” the directors of the Bijou ditch, Shimmin said.

Mike Groves, president of the Bijou Irrigation Company, testified that the oil companies do not “play ball” with the ditch companies. “We’re protecting what’s ours.”

The language in SB 191 would take away some of our rights, claimed Jim Yahn, manager of the North Sterling Irrigation Ditch. “We want oil and gas companies to succeed, but we want control of when and how.”

Scott Edgar, representing the Farmer Reservoir and Burlington irrigation companies, said they are not opposed to crossings and in fact granted 150 of them in 2012. However, the ditch companies cannot afford to go to battle with international oil companies. He said his ditch companies have gotten condemnation threats from the oil companies, and are currently fighting with one company that says it doesn’t have to get a crossing agreement.

Two witnesses spoke in favor of SB 191. RJ Hicks of the North Metro Chamber of Commerce pointed out that pipeline companies have a good track record. He warned that if the bill does not pass, the alternative for oil companies is to truck the product along Colorado’s highways, creating congestion and safety issues.

“No one is suggesting not to build pipelines,” responded Sen. John Kefalas (D-Fort Collins). He asked whether there are processes needed to avoid putting peoples’ lives, or agricultural water,

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at risk. “The ditch companies will have to answer that,” said Hicks, but he assured the committee that the oil and gas companies’ first concern is for public safety, and that pipelines have been a sound way of transporting oil.

Jeb Seman, representing the Colorado Petroleum Association, said the bill is merely an effort to correct a 2012 Colorado Supreme Court decision. “This does not expand current law as it relates on condemnation. It doesn’t grant any powers” to the oil companies, nor will it lead to more condemnation actions, he said. Seman also said that the bill would not affect the St. Jude case, although he did not object to the bill being amended to make that clear.

If the bill is not adopted, it will reduce the industry’s ability to move product to market, Seman told the committee. It will force companies to choose alternatives to pipelines, he said.

Sen. Gail Schwartz (D-Snowmass Village) disagreed, stating the threat to “truck all this stuff is a false choice.” But she said she also was concerned about the lack of local government involvement in the process and lack of adequate review by local governments.

Committee chair Sen. Jeanne Nicholson (D-Blackhawk) decided to allow more time for amendments to SB 191 and postponed the committee vote, which is expected this week.

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