

Bill would impose fine for illegal diversion of surface water

Written by Marianne Goodland, Legislative reporter

The Senate Agriculture and Natural Resources Committee took up the issue of surface water in the past week, unanimously passing a bill that could set up a \$500-per-day fine for illegal surface water diversions.

SB 10-27 is sponsored by Sen. Paula Sandoval, D-Denver and Rep. Ellen Roberts, R-Durango. The committee approved the bill unanimously on Jan. 28 and sent it to the Senate Appropriations Committee for further action.

The bill would impose the same fine for illegal diversion of surface water as is in place for illegal diversion of ground water.

In a recent interview, Roberts said she and Sandoval were asked to carry the bill by the Attorney General in part to help resolve an issue that went through the courts last year.

The case involved illegal surface water diversion in the Rio Grande River Basin in the San Luis Valley. Someone was diverting surface water into three ponds. The state engineer (who administers water resources) sent the man a cease-and-desist letter, but that didn't stop the illegal diversion. The Attorney General filed suit in January 2009 and won a judgment on the case in June.

The Appeals Court upheld the decision in November. During the ag committee hearing, Deputy Attorney General Geoffrey Blue testified the Attorney General's office is not sure whether the person ever complied with the engineer's order.

"In the meantime, a lot of excess water got diverted, which hurt the water rights of the rightful owner," Blue said in a recent interview.

Colorado law already has a \$500-per-day fine for illegal diversion of ground water, a law that has been in place since 1969. Because of that fine, ground water problems usually get resolved in three to four weeks, Blue said.

Roberts said the penalties might accrue in those cases, but they typically settle for a lower

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amount with the offenders. “It’s not about balancing the state budget on the back of water cases,” she said. “We never ask for the full amount,” added Blue. “It’s about driving compliance with the law.”

Dick Wolfe, state engineer and director of the Division of Water Resources, told this reporter he typically sees between six and 10 complaints per year about illegal surface water diversion and about the same number for illegal ground water diversions. Most surface water complaints arise from situations where the person diverting the water has no water rights at all. The rest come from excess diversions of surface water.

Wolfe said most complaints originate in the Arkansas River Basin area, in southeastern Colorado, or in the South Platte River Basin, which covers northeastern Colorado and the Denver metro area.

“There is a perception that there is an inequity on enforcement,” Wolfe told the committee last week. “We have relatively good compliance and relatively few violations.”

Fines collected from those who violate the ground water law do not go to the Division of Water Resources; those dollars are paid into the state’s general fund, which is primarily made up of corporate and individual income taxes and state sales and use taxes.

The bill’s fiscal note, which describes the amount of money generated by a proposed law, estimated the annual amount of revenue generated at about \$2,500; Wolfe explained during the hearing Thursday that was because lower fines are usually negotiated with violators, and the courts have never ordered a \$500-per-day fine for violations, according to Blue. Because there is an anticipated financial impact for the state, committee sent SB 27 to the appropriations committee.

So do people who divert more surface water than they should know they’re doing it? Blue cites a case dealing with the “knowledge” issue. The defendant, a farmer, was using water to irrigate crops. According to Blue, the farmer knew the order of the state engineer, which limited how much he could use, existed but claimed one of his children had opened the spigot.

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Blue said the Colorado Supreme Court ruled in the state's favor, saying that the farmer should have known the water was being diverted illegally.

In other news

SB 52, which would make it clear that a final permit for ground water wells in a designated basin is final, sailed through the Senate last week without opposition and is on its way to the House. The bill got final approval from the Senate on Jan. 28 on a 35-0 vote.

Sen. Greg Brophy, R-Wray, is the bill's sponsor. He told the Senate during debate Tuesday the agriculture committee, which approved the bill on Jan. 21, had heard from bankers, farmers and community leaders on the necessity for "the surety this bill represents. It's an important part of everyone's balance sheets and portfolios."

While the bill had little opposition in its trip through the Senate, it may face more in the House. Mark Lengel of Burlington, who opposed SB 52 at the Jan. 21 hearing, said he would take his fight to the House and wouldn't be alone. Lengel said his family has had surface water rights for more than 100 years. "I've got senior water rights, and the law [will] say we can never change the boundary," he said. His farm, in the Republican River Conservation District, has both surface water rights and ground water wells.

He said he was told several years ago to shut down the wells because they were impacting the river, but he has not yet done that.

The Division of Water Resources could be spared some of the budget cuts and layoffs anticipated for 2010-11, under a bill approved on Jan. 26 by the House Agriculture, Livestock and Natural Resources Committee.

HB 10-1006 was recommended by an interim Water Resources Review Committee that met during the summer. Under the bill the division would receive up to five percent of monies from an operational account in the Department of Natural Resources that is funded by severance taxes (taxes generally paid by oil and gas companies to "sever" resources from the land).

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Bill sponsor Rep. Kathleen Curry, I-Gunnison, told the committee she was trying to find a different source of funding for the division, which is heavily reliant on state general fund dollars.

Gov. Bill Ritter, in his 2010-11 budget request, asked the division's budget be cut by \$1.32 million; from \$22,218,201 in 2009-10 to \$20,895,075; and its full-time staff reduced from 272 employees to 252.

The division receives 91 percent of its funding from the general fund, which has been severely impacted by the 2008 and 2009 economic downturn. The Ritter administration and the General Assembly are looking for ways to cut the state budget (and general fund expenditures) by \$1 billion in 2010-11.

"My main goal is to make sure the division does not lay off water commissioners, and we shouldn't have to do that when there are cash funds available in the department," Curry said. The budget cut ordered for the division would eliminate six positions, which Curry said might include water commissioners who inspect wells, issue shut-down orders and collect water and diversion data.

Under HB 1006, \$413,000 of the \$1.3 million cut would be replaced by funds already available in the severance tax trust fund. Curry said more is expected that would hold off more budget cuts. Those dollars currently provide some of the funding for the Division of Wildlife. Curry explained the severance tax dollars went to the wildlife division several years ago to address areas impacted by oil and gas activity. "I thought we needed to prioritize and it's more critical to fund the water division," she said.

HB 1006 was approved on an 8-4 vote and sent to the House Appropriations Committee for further action.

A package of a dozen bills designed to bring in about \$140 million to help balance the 2010-11 budget made its way through the House in the past week. A sometimes-raucous hearing on the bills in the House Finance on Jan. 27 lasted 13 hours, ending at 2:30 a.m. on Jan. 28. One bill, HB 1195, would suspend for three years exemptions from state sales and use taxes for the

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sale, storage, use or consumption of agricultural compounds used in caring for livestock; bull semen and pesticides used for agricultural production and livestock.

If the bill passes and is signed by the governor, the taxes would go back into effect on March 1 and end on June 30, 2013.

The taxes could generate about \$900,000 for the state budget through June 30, 2009 and \$4.6 million in 2010-11.

The tax exemptions were originally enacted in 1999. Agricultural compounds covered under the 1999 law include insecticides, fungicides, growth-regulating chemicals, enhancing compounds, vaccines, hormones, drugs used for prevention or treatment of disease or injury in livestock and animal pharmaceuticals approved by the Food and Drug Administration.

HB 1195 was approved on a 6-5 vote, with six Democrats voting in favor and the committee's five Republicans voting against. It passed the House after second reading debate last Friday and was approved by the full House, 34-31, on Monday. The vote was along party lines, supported by the House's 34 Democrats and opposed by the 31 Republicans and Rep. Kathleen Curry, I-Gunnison.