

On August 13, the Interim Water Resources Review Committee of the Colorado General Assembly received a work group report intended to Explore Ways to Strengthen Current Water Anti-Speculation Law (as required by Colo. Rev. Stat. § 37-98-103). The work group included 22 members with diverse perspectives including people affiliated with the agricultural community, environmental and recreational interests, and municipal water providers, as well as attorneys with a variety of backgrounds in water law. In addition, it included members of the State Engineer's Office, Colorado Water Conservation Board, Attorney General's Office, and the Judicial Department.

The report was requested, at least in part, "...due to concerns by Colorado water users that businesses, including some outside of Colorado, were appropriating or purchasing water rights with the primary motivation of profiting from a later transaction such as sale, lease, or payment for non-diversion of those rights - even if they have a current plan to beneficially use the water rights. Some people perceived those businesses to be more concerned with generating a profit based on changes in the market value of water rights than with using the water, and hence described those purchases as 'speculative.' That terminology could be confusing because 'speculation' is also a term of art in Colorado water law. Speculation as prohibited under existing law is generally subject to review by [Colorado] water courts only when a water right is appropriated, changed, or a claim for diligence is made for a conditional water right. Conveyances or purchases of water rights are not normally subject to review by the courts. That type of speculation that is prohibited under existing law essentially refers to the concept of trying to secure the right to use water but without a specific plan and intent to put the water to beneficial use. Colorado's legal definition of 'speculation' thus generally does not expressly cover the sorts of appropriations and purchases of water rights that provided the impetus for SB 20-048. This Report refers to activity within Colorado's existing legal definition of speculation as 'Traditional Water Speculation.' Speculation defined relative to profit as primary motivation is referred to as 'Investment Water Speculation.'"

The legal foundations of Traditional Water Speculation are detailed along with existing tools to prevent such speculation. However, water right conveyances without a change of water right are unlikely to be reviewed for Investment Water Speculation using existing tools. The report addresses the potential risks and negative outcomes that might result from either.

The work group also identified and enumerated common values shared among its members. "Coloradans value water for its beneficial use. Water should not be traded as a commodity for profit. Coloradans value irrigated lands, safe and reliable drinking water, and the environmental, recreational, and community benefits derived from our water resources. Coloradans value property rights in the beneficial use of water and the protection of these property rights."

Next, the work group brainstormed potential concepts to protect these values and address potential risks and negative outcomes, and evaluated in detail the pros and cons of each concept. A select group of concepts were included in the report for the Committee's consideration, intended to meet the General Assembly's criteria in SB 20-048: (1) a change in law; and (2) the potential to effectively reduce Investment Water Speculation on a large scale, rather than just in certain limited situations. Due in part to the drawbacks identified for each of the concepts, and a lack of consensus, the work group did not recommend any of the concepts for implementation. Eight concepts that met the statutory criteria were described in greater detail, with a focus on the potential drawbacks.

Concept E: Prohibit or penalize compensated non-diversion. The receipt of payment [for non-diversion] would be made illegal or penalized, unless that payment occurs pursuant to an exception allowed by law. Potential penalties for receiving payment for non-diversion include abandonment of the water right. The primary focus of this concept would be to address speculation near the state line.

Concept G: Fund and/or create a right of first refusal for the purchase of water rights for long-term irrigation use for public benefit. This concept would provide funds for a public entity to purchase irrigation rights to keep those rights in irrigation use. Alternatively, or in combination, the State or other entities would be granted a right of first refusal to purchase irrigation water rights before those rights can be sold to an Investment Water Speculator.

Concept H: Eliminate or reduce the agricultural tax benefit for lands from which water is removed. This concept would reduce the benefit for lands converted from irrigated agriculture to non-irrigated agriculture land use types.

Concept I: Unless irrigated land is going to be changed to a new land use, require water to be tied to the land. This concept would impose stringent limits on when water rights currently used for irrigation can be changed to other uses.

To be effective in reducing Investment Water Speculation, the concept would need to be applied to a broad swath of lands and water rights, as otherwise the concept might simply increase speculative pressure on water rights for which changes of use are permitted.

Concept J: Create a statewide process to identify and prohibit Investment Water Speculation. This concept would create a statewide process through the water courts, a state agency, or another government body by which water rights purchases would be reviewed for speculative intent and blocked if speculative intent is found.

Concept K: Encourage local governments to police Investment Water Speculation through their permitting powers. Counties already have some powers to regulate water projects. For example, a county may require a permit for development of reservoirs, pipelines, canals, and other water supply facilities located in that county to provide a water supply for use in another county. These powers are commonly referred to as "1041 powers," based on HB 74-1041. This concept would significantly expand the reach and usage of these powers by modifying the statutory language governing 1041 powers to explicitly cover review of water rights sales for speculative intent and providing state funding to counties to develop and implement 1041 regulations under the new designation.

Concept L: Tax the profit derived from sale or lease of water rights previously purchased for Investment Water Speculation purposes. This concept is similar to Concept J and would require a similar process to review the intent of a water right purchase. However, instead of outright preventing transactions identified as Investment Water Speculation, this concept would merely disincentivize the transactions by imposing a tax. The tax would apply to all subsequent payments to the purchasing entity involving the water right, at a rate that would make Investment Water Speculation less attractive.

Concept P: Establish a maximum rate for any water right price increase and impose higher taxes when the rate is exceeded. This concept would establish a water right price increase rate, above which a high tax rate would need to be paid on water right transactions.

Common drawbacks related these concepts include a high cost to implement or impacts to the time and cost of water transactions for all water users, even those who are not speculative investors. Further, the work group recognized that concepts that reduce the sale price of water rights, and therefore, their value as property, present a risk to the current owners of irrigation water rights. Several other concepts that the work group discussed did not meet the two statutory criteria listed above, but might otherwise be beneficial to Colorado and, "...therefore, may be worthy of consideration by the Committee and the Colorado water community in other contexts."