



# **Drowning in Legislation**

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*A Review of Water Bills Before the  
2003 General Assembly*

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# Executive Summary

Colorado water law developed over the last 150 years to recognize and protect private property rights in water use, despite repeated attempts to centralize and socialize the allocation of this important resource. It is perhaps the best example of private property creation and protection in the Western United States for a complicated, moving resource.

Article 16 of the Colorado Constitution sets forth the principles of water law in our state:

**Water of streams public property.** The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

**Diverting unappropriated water priority preferred uses.** The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

**Right of way for ditches, flumes.** All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

**County commissioners to fix rates for water, when.** The general assembly shall provide by law that the board of county commissioners in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

Thus, water not appropriated before 1876 is a public resource. The right to beneficial use of unappropriated waters “shall never denied.” Domestic use is accorded highest priority, with agricultural use second. (The Colorado Supreme Court interpreted this to apply only to condemnation in *Town of Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 94 P.

339 (1908)). Beneficial use of water is encouraged by guaranteeing a right of way for ditches. County commissioners are empowered to set charges for water use.

Rights to the use of water under Colorado water law are private property rights, which can be bought and sold, transferred to other uses and transferred to other locations. A long history of conflict and cooperation has resulted in a water law system that has steadfastly defended the rights of individuals to appropriate water. An overview of the Colorado system of water rights allocation is contained in my 2002 paper for the Independence Institute, *"Use it Or Lose It: Colorado's Oldest and Best Recycling Program."*

Some market principles that guide the wise use and allocation of water resources include:

1. Respect for private property rights.
2. Allowing supply and demand to guide water transfers, rather than "Soviet-style" statewide water planning.
3. Allowing the marketplace, not politics, to decide which water projects are feasible, sensible and beneficial.

Markets have a remarkable ability to limit uneconomic or unwise projects by requiring projects to be funded by those who want them. Markets do not guarantee that only wise projects will be built, but they do require that project proponents (or their investors) finance them, instead of forcing unsuspecting taxpayers to fund projects that are poorly conceived, nebulous, uneconomic, or even silly. In Colorado, the market discipline that requires purchasing senior water rights for new water uses tends to reduce mistakes by local governments (cities and water districts), due to competition for those water rights.

Water is an important issue for the current 2003 legislative session of the Colorado General Assembly, with 31 water-related measures introduced. The table below describes each bill, along with a YES or NO grade for consistency with free market principles, and an explanation. Bills are listed in numerical order, beginning with House Bills (HB), House Joint Resolutions (HJR), Senate Joint Resolutions (SJR) and Senate Bills (SB). Except as specifically noted, all measures below are still alive in the legislative process, or awaiting the Governor's signature.

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## HB 1001 – Flexible Use of Water Resources

Description:	YES or NO	Reason(s):
State subsidy for facilities bonds (SECTION 1).	<b>NO</b>	Let water providers get their own bonding. If a project can't attract investors, the project shouldn't be built. This risk is how markets limit stupidity.
Allows State Engineer to approve temporary water plans during a drought (SECTION 2).	<b>NO</b>	Could allow suspension of appropriation doctrine just when senior rights need protection most. One good subsection on dam improvements appears to be redundant to State Engineer's existing authority.
Requires the State Engineer to cooperate with entitles seeking the use of federal facilities during droughts (SECTIONS 4&5).	<b>YES</b>	Cooperation language is benign, though State Engineer's budget is limited.
Authorizes \$3 million from the CWCB to implement its statewide water supply initiative (SECTION 6).	<b>NO</b>	The State should not get deeper into the water planning business. Water providers are best equipped to do this, in response to supply and demand.

## HB 1005 – Extend Divisions 1 & 3 Augmentation

Description:	YES or NO	Reason(s):
Extends implementation dates for more stringent water augmentation requirements.	<b>NO</b>	Rules to protect other water rights from injury should not be delayed further than existing law.

## HB 1008 – Conservation Easements for Water Rights

Description:	YES or NO	Reason(s):
Adds water rights to existing statute.	YES	Recognizes water rights as equal to other property rights for the purpose of conservation easement.

## HB 1090 – Develop Denver Basin Aquifers

Postponed indefinitely 2/20/03

Description:	YES or NO	Reason(s):
Prohibits water courts from decreeing a transmountain water right to an applicant who has the right to develop water from Denver basin aquifers, unless the right is already being put to maximum beneficial use.	NO	Restricts flexibility of water providers to choose among water sources. The existing water rights system, including instream flow rights, can be used to better achieve the apparent goal of minimizing claims to surface water when Denver Basin groundwater is available. Denver Basin groundwater is finite, allocated assuming it will last 100 years. These management decisions should be left with water providers.

## HB 1092 – Management of State-Owned Forested Land

Description:	YES or NO	Reason(s):
Directs department of natural resources to manage forested state lands to reestablish natural forest conditions, reduce wildfire threat and conserve and restore natural water yields.	YES	No impact on water rights.

## HB 1096 – Use Oil and Gas Byproduct Water

Postponed indefinitely 1/30/03

Description:	YES or NO	Reason(s):
Allows some groundwater developed from mining to proceed without State Engineer permit.	NO	Removes existing requirement that this applies only to nontributary groundwater. By allowing tributary groundwater to be included, injury would result to other water rights, without legal recourse.

## HB 1100 – Natural Resources Federal Lands

Description:	YES or NO	Reason(s):
Authorizes Colorado agencies to coordinate with federal agencies to develop resource management plans.	YES	No impact on water rights.

## HB 1113 – Basin of Origin Compensation

Lost on 2d reading 2/18/03

Description:	YES or NO	Reason(s):
Requires water judges to address direct economic effects from water rights transfers.	NO	Contradicts state constitution's right to appropriate water. This amounts to a county tariff on water transfers.

## HB 1120 – Water Conservation Measures

Postponed indefinitely 1/20/03

Description:	YES or NO	Reason(s):
Invalidates restrictive landscaping covenants (SECTION 1).	NO	The state should not tell water providers how to allocate water among competing uses. Metropolitan water providers have already addressed this.
Expands hours prohibiting state facility landscape watering (SECTION 2).	YES	Encourages conservation without affecting other water rights.
Reduces sales taxes to encourage water-saving features (SECTIONS 3 & 4).	YES	Temporary reduction in taxes may encourage installing water saving devices.
Adds exception to abandonment rules (SECTION 5).	NO	Water not used belongs to others under the appropriation doctrine.

## HB 1146 – Water Quality Term in Change Decrees

Lost on 3d reading, 3/6/03

Description:	YES or NO	Reason(s):
Allows water judges to include water quality terms in change decrees.	NO	This could be used to effectively prohibit any new appropriation, since existing water quality constituents could be concentrated by a reduction of dilution water.

### **HB 1195 – Elect Water Conservancy District Boards**

Postponed indefinitely 3/4/03

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Requires directors of water conservancy districts to be elected instead of appointed.	<b>NO</b>	Removes all language requiring expertise and geographical representation. Eliminates court removal of directors for malfeasance and willful neglect.

### **HB 1233 – Water Basin Planning Councils**

Postponed indefinitely 2/19/03

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Creates water basin policy planning councils.	<b>NO</b>	Centralized planning won't work any better in Colorado than it did in the Soviet Union.

### **HB 1280 – Extend State Engineer Water Bank**

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Allows State Engineer to extend the concept of water banks from the Arkansas River basin to other basins.	<b>NO</b>	Potential impacts are not clearly set forth. Fails to recognize differences between basins. Gives State Engineer more power without sufficient justification.

### **HB 1288 – Government Immunity and Public Facilities**

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Modifies and adds definitions to existing government immunity law.	<b>YES</b>	No apparent impact on water rights.

### **HJR 1007 – Water Pollution Control Revolving Fund**

Signed by the Governor 2/7/03

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Adds and deletes multiple projects to/from the water pollution control revolving fund eligibility list.	<b>YES</b>	No impact on water rights.

## HJR 1008 – Drinking Water Revolving Fund

Signed by the Governor 2/12/03

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Additions and modifications to drinking water revolving fund eligibility list.	<b>YES</b>	No impact on water rights.

## HJR 1011 – Claim Colorado River Water

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Identify, claim and put to beneficial use Colorado's share of Colorado River Compact water.	<b>YES</b>	Asserts and reaffirms Colorado's claim to Colorado River Compact water. Enhances Colorado's water position, without adversely affecting any water right.

## HJR 1012 – Species Conservation Eligibility List

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Allocates amounts from existing fund to specific projects.	<b>YES</b>	No impact on water rights.

## HJR 1015 – Legal Impediments to Conservation

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Call to homeowners associations, municipalities and counties to review and revise laws to promote water conservation.	<b>YES</b>	Suggests water providers revise policies to conserve water, without any apparent impact on water rights. Other issues not considered in this recommendation.

## SB 45 – Increased Well Regulation

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Adds periodic inspection of wells (SECTION 1).	<b>YES</b>	If funded by well permit fees and fines for non-compliance, this would not add to taxpayer burden.
Modifies definitions of terms (SECTION 2).	<b>YES</b>	More comprehensive definitions of well users.
Removes obsolete language (SECTION 3).	<b>YES</b>	Removes old language that is outdated.
Defines duties of State Board of examiners of water well construction and pump installation contractors (SECTION 4).	<b>YES</b>	Includes enforcement language concerning abandonment, repair, drilling, redrilling, casing, recasing, deepening or excavation of wells. Enforcing proper construction and operation of wells is necessary to protect other water rights from potential injury.
Includes continuing education requirement, requires license from board to construct well (SECTION 5).	<b>NO</b>	Adds business license requirement to existing technical licensing requirements. One license (well driller or pump installer) should be enough.
Removes obsolete language and clarifies definitions for well drillers and pump installers (SECTION 6).	<b>YES</b>	Clarifications appear to be reasonable.
Creates separate fund for licensing fees (SECTION 7).	<b>YES</b>	Funded by fees, not general tax revenues. Remove business license reference.
Revocation of license or not comply with continuing education and fines from \$50 to \$1000 (SECTIONS 8&9).	<b>NO</b>	More justification is needed for fines, which seem arbitrary and extreme on high end. A maximum of \$500 would be more reasonable.
Adds requirement that well drillers or pump installers remedy noncompliant installations, impose penalties from \$100 to \$5000 (SECTIONS 10&11).	<b>NO</b>	More justification is needed for fines, which seem arbitrary and extreme on high end. A maximum of \$1000 would be more reasonable.
State Engineer shall monitor well inspection program and defines qualifications of inspectors (SECTION 12).	<b>YES</b>	Inspectors funded by cash fund created in Section 13. Employment of more inspectors by State Engineer could be abused, if not limited.
Creates well inspection cash fund (SECTION 13).	<b>YES</b>	Separate account for well inspections is a good idea, not mixed with other funding mechanisms.
Increase well permit fees from \$60 to \$100 (SECTIONS 14-17).	<b>YES</b>	These user fees are appropriate charges, paid by well permit owners to defray costs of well regulation.

Increase fees for exempt wells from \$20 to \$60 (SECTION 18).	<b>YES</b>	These user fees are appropriate charges, paid by well permit owners to defray costs of well regulation.
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### **SB 47 – Water Resources Review Committee**

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Deletes repeal date for the committee’s ability to report committee bills exempt from limits. Allows committee to meet during regular legislative session.	<b>YES</b>	No impact on water rights.

### **SB 73 – Increased Authority of State Engineer**

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
State Engineer shall promulgate rules and regulations for Division 1 (South Platte basin) wells.	<b>NO</b>	Allows continued injury to senior surface water rights on South Platte River by delaying requirements for augmentation of out-of-priority depletions. The water court has properly ruled that the State Engineer exceeded its authority in this matter, and the Colorado General Assembly should not change this. Conditions listed for State Engineer to approve plans are inadequate. The water court is the proper place to deal with such complicated injury issues as well depletion timing, impact of out of priority depletions and the adequacy of augmentation sources.

### **SB 85 – State Engineer Approval of Temporary Water Loans**

<b>Description:</b>	<b>YES or NO</b>	<b>Reason(s):</b>
Allows Division Engineers to approve loans of water rights for up to 120 days upon submission of evidence quantifying rights and a finding of no injury to other water rights.	<b>NO</b>	Injury issues from changes in water rights, even if temporary, are too complex and controversial to be left to the State Engineer and his Division Engineers. This scope is too broad, usurping the water court’s function.  Note exception below.
Division Engineer approval of water loans to Colorado Water Conservation Board (CWCB) for instream flow protection.	<b>YES</b>	Since loaning water rights for instream flow simply adds to the streamflow downstream of the water right’s normal point of diversion, Division Engineers could be authorized to approve such loans upon a finding of non injury. Technical issues would be much simpler than the wider scope of the bill described above.

### SB 87 – Improvement of Urban Water Use Efficiency

Description:	YES or NO	Reason(s):
Requires public projects and facilities to reduce their total annual water consumption. Prohibits new covenants or land use regulation that limits drought-tolerant landscapes. Requires water providers to inform public about maximizing outdoor water use efficiency, to identify and repair leaks, decrease residential water use and deliver a water use efficiency plan to the CWCB.	<b>NO</b>	Urban water providers, under strong incentives to conserve water as a result of last year’s record drought, don’t need the State to micromanage their water systems. This bill is discriminatory, as it requires a small minority of water users to conserve, but says nothing about most other water uses in Colorado, predominantly agriculture. Submitting water efficiency plans to the Colorado Water Conservation Board (CWCB) for approval would severely limit the effectiveness and timeliness water users need to respond to supply and demand issues.

### SB 90 – Water Rights Determination Standards

Description:	YES or NO	Reason(s):
Directs State Engineer and water courts to consider conservation to reduce consumptive use, efficiency standards and replacement of phreatophytic (water-loving) plants with other species.	<b>NO</b>	Reduced consumptive use means a water right has not been exercised to its fullest extent. Unless this reduced consumptive use is properly quantified in water court and terms and conditions have been formulated to prevent injury to other water rights, its effects belong to the stream, to be allocated among other water rights.

### SB 94 – Mandatory Water Supply Inclusion in Local Master Plans

Postponed indefinitely 2/12/03

Description:	YES or NO	Reason(s):
Requires counties to include a water supply element in Master Plans.	<b>NO</b>	More centralized water planning that can be better accomplished by water providers who have the expertise and incentive to solve water problems.

## SB 110 – Funding of Colorado Water Conservation Board Projects

Description:	YES or NO	Reason(s):
Authorizes specific water project loans from the CWCB construction fund (SECTIONS 1-4).	YES	This includes the routine allocation of CWCB construction fund monies to specific water projects.
Data collection, satellite monitoring, instream flow software applications, floodplain maps, floodway project, technical assistance and transit loss studies and other (SECTIONS 5-13)	YES	This appears to be a continuation of routine allocation of CWCB funds to specific projects.
Allocates \$3 million to statewide water yields assessment and water supply initiative (SECTIONS 14&15).	NO	This is more statewide water planning, without specific projects, which can and should be better done by water users who have specific, defined interests in water allocation.
Colorado River return project (The “big straw”). Authorizes \$500,000 to study the feasibility of this project. (SECTION 16).	NO	Water quality, pumping and pipeline costs and the difficulty of allocating the yields of such a project without specific water users listed are just some of the reasons why existing water users have not considered this project. This project could be studied for much less than \$500,000, with savings better spent funding small infrastructure projects in the state.
Small water projects funding, restoration of infrastructure and flood response fund balance and work defending Colorado’s interstate compact entitlements (SECTIONS 17-20).	YES	These kinds of projects are where the CWCB’s financial assistance has done the most good, especially with smaller water users who often have difficulty meeting state requirements. The compact protection aspect of this is particularly appropriate for state, as opposed to private water user, action.

## SB 115 – Project In-Basin Use of Agricultural Water Rights

Description:	YES or NO	Reason(s):
Defines “significant water development activity” as removing 1000 acre feet per year of consumptive use from one county to another, for a purpose other than agriculture (SECTION 1).	NO	Arbitrarily discriminates against non-agricultural water transfers, which constitute a very small percentage of water used in the state. This would inhibit streamflow enhancement from transferring water rights from upstream to downstream.
Requires “significant water development activity” applicants to water court to notify multiple agencies in addition to the water court (SECTION 2).	NO	1000 acre feet definition as a “significant water development activity” is arbitrary.
Water judges must include payment of fees to county (SECTION 3).	NO	More county tariffs, restraint of trade, contradicting the Colorado constitution’s right to appropriate water without injury to other water rights.
Mitigation payments and water rights taxes (SECTIONS 4-6).	NO	Existing water rights system allocates a complicated array of competing interests, from municipal to instream flow uses, in a balanced, dynamic way that rewards placing water to beneficial uses. A whole new kind of tax on water rights is a dangerous precedent.

## SB 126 – CWRPDA Procedures for Development of Water Projects

Description:	YES or NO	Reason(s):
Encourages the Colorado Water Resources and Power Development Authority (CWRPDA) and the Colorado Water Conservation Board (CWCB) to enter into agreements to assist in the development of water resources, including repeal of requirements inhibiting such agreements (SECTIONS 1-5).	YES	This provision appears to streamline cooperation between state agencies. No apparent impact on Colorado water rights.
Specific project authorizations and declaration that Colorado’s policy is to fully utilize water resources available under interstate compacts (SECTION 6)	YES	Protects Colorado’s entitlement to water available under interstate compacts. No apparent impact on Colorado water rights. No new projects added by this amendment.

## SB 236 – Issue Voter-Approved Bonds to Finance Water Projects

Description:	YES or NO	Proposed ballot language and reasons for recommendation:
<p>Requires submission of ballot question to the registered electors of the state at the November election seeking their approval to allow the CWCB to issue up to \$10 billion of water infrastructure revenue bonds. Projects would have to be approved by the Governor. Funds projects of at least \$25 million.</p>	<p><b>NO</b></p>	<p>“Shall State of Colorado debt be increased \$10,000,000,000 with a repayment cost of \$_____ for the purpose of addressing the water infrastructure needs of the State through the issuance of revenue bonds, with no increase in any taxes and with any bonds issued to be repaid solely with revenues and receipts derived from the sale of water, power or other assets by the Colorado Water Conservation Board from water infrastructure projects financed by the bonds, bond proceeds, and interest and income earned on the deposit and investment of such proceeds and revenues and receipts, and shall such revenues and receipts and such interest and income constitute a voter-approved revenue change?”</p> <p>Despite language to protect the Colorado taxpayer from future liability, it is difficult to see how State involvement to facilitate funding projects that have not yet been conceived will result in wise use of state resources. Water providers should take the initiative for such projects, including cooperative intergovernmental agreements where necessary. Water providers are much more qualified to make wise decisions for such projects because of specific demands of their customers. The market discipline required for such projects by water users tends to limit the development of grandiose, heavily subsidized projects that discourage conservation and wise water management practices.</p>

## SJR 007 – Secretary of Interior Support

Signed by Governor 2/7/03

Description:	YES or NO	Reason(s):
Support Secretary of Interior's enforcement of California's entitlements pursuant to the Colorado River Compact.	YES	Helps protect Colorado's claim to Colorado River Compact water without adversely affecting any Colorado water right.

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