

HOUSE BILL 1026

FLEX Use

Purpose: Encourage alternatives to “buy and dry” of agricultural lands by giving owners of agricultural water rights the opportunity to quantify the rights in water court and provide a portion of the water to municipal, industrial and conservation users while retaining the irrigation use of the right

BACKGROUND : Alternative Transfer Methods

- Colorado’s Statewide Water Supply Initiative Study (“SWSI”) predicted significant population growth in the state by the year 2050, particularly in the South Platte basin.
- SWSI further identified a significant gap between the anticipated demand and available and projected water supplies for municipal and industrial purposes
- In the absence of an alternative, additional water supplies will come through the purchase of agricultural water rights and the removal of water supplies from irrigated agriculture. This practice, commonly referred to as “buy and dry,” has significant negative impacts to agricultural economies and communities
- In 2007, the General Assembly established a competitive grant program to encourage the development of alternatives to the “buy and dry” approach
- The FLEX Study, sponsored by the City of Aurora, Ducks Unlimited and Colorado Corn was funded by the competitive grant program. The FLEX Study’s most recently completed report, entitled “FLEX Market Model Project Completion Report,” was published in June 2013, and is available from the bill sponsor or CWCB.
- The FLEX approach focuses on the development of voluntary markets whereby agricultural users could lease a portion of their water supply to M&I and conservation uses at times, generating a revenue stream, while continuing to irrigate with the remainder of the right.
- Water could be produced while maintaining irrigated agriculture by temporarily:
 - Fallowing a portion of lands normally irrigated
 - Changing crops to a lower consumptive use crop
 - Delivering less water to crops using a method referred to as “regulated deficit irrigation”
- Providing agricultural users the opportunity to participate in a market provides an option to the traditional “buy and dry” approach, and would provide stabilizing revenue needed to survive fluctuating commodity prices, thereby encouraging the continuation of irrigated agriculture.
- From a policy perspective, it is most efficient to allow multiple uses for decreed water rights, particularly the most senior water rights. As a state, we will have to become more efficient with our rights if we are to meet the SWSI identified gap.

- Increased in-basin efficiency will reduce the need for controversial trans-basin diversions.
- The Interbasin Compact Committee's draft "Low/No Regrets Action Plan" calls for significant contributions to M&I water supply from alternative transfer mechanisms

NEED : Incentivize Alternative Transfer Methods, Markets

- Markets for water provided using alternative transfer methods have been slow to develop. Water Users cite legal barriers and high transactional cost as the primary reasons more of them do not participate.
- Unless the general assembly takes decisive action to incentivize alternatives by reducing "red tape," the state's course will not change and large areas of irrigated agriculture will be dried up to support municipal growth.
- One significant step to encouraging alternative transfer method ("ATM") markets is to permit agricultural water rights owners to quantify their water rights and qualify them for uses in addition to irrigation use.
- Under current statutes, agricultural water users may apply for a change in use, but must identify a specific end user for the water rights. This discourages market formation, because it legislates a "market of one" and makes it difficult to justify the capital investment necessary to make the change in use.
- Agricultural users who make the investment to change their rights to include other uses and to provide water using alternative transfer mechanisms should be rewarded by permitting them to enter into leases with more than one party. This would allow competition between M&I water users for these water supplies and create a market dynamic that is beneficial to all parties.

SOLUTION: "FLEX Use"

- Creates statutory "FLEX" use as substitute for end users in water court and administrative applications
- Allows quantification of CU for "FLEX" uses, delivery at identified river locations
- FLEX is water "wild card" usable in a broad range of applications, including non-consumptive uses and compact compliance
- Contingent on continued irrigation of farm, use of alternative transfer methods
- May be used only in water division of historical use: no trans-basin transfers
- Water court case defines consumptive use and return flows, point of delivery
- Return flows replaced in time, place and amount: applicant must prevent injury

HOUSE AMENDMENTS

- Amendments were added in the House to:
 - Prohibit FLEX use for trans-basin transfers
 - Nullify the FLEX Use privilege if the entire farm was fallowed for more than three consecutive years, indicating a "buy and dry" had occurred
 - Clarify the legislative intent that irrigation must continue on the FLEX farm