

# [***ARTICLES: MAKING COLORADO'S RIVERS A (SENIOR) PRIORITY***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5RH0-3KT0-00SW-50SK-00000-00&context=1516831)

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[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). INTRODUCTION

For 138 years, ***Colorado***'s court doors have been open to confirm irrigation water rights. [[2]](#footnote-3)2 For 114 years, those doors have been open to all water rights except instream flow water rights. [[3]](#footnote-4)3 Just in the last forty-four years have courts confirmed instream flow water rights. [[4]](#footnote-5)4 It's not difficult to see that in this race to the courthouse called the prior appropriation system, ***rivers*** were held at the starting line. Before 1973, as ***Colorado***'s population grew and withdrawals from ***rivers*** increased, if water remained in a ***river***, it was a product of geography and administration: a reservoir release or bypass, a downstream call, or a compact allocation.

But today, as ***Colorado*** sits firmly in a new era - one of reallocation - the landscape for ***rivers*** and their place within the prior appropriation system has improved. This article examines the ways in which stakeholders, such as the ***Colorado*** Water Conservation Board ("CWCB"), the General Assembly, the state court system, water users, and non-profit partners have all cooperated to restore ***rivers*** in ***Colorado***. Recently, a report from Stanford University ranked ***Colorado*** first among ***Colorado*** ***River*** basin states for the "extent and effectiveness of laws and policies … to create dedicated water rights for instream and other environmental uses." [[5]](#footnote-6)5 What follows is how ***Colorado*** got there and where it is going.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). CREATION OF ISF PROGRAM

Gaylord Nelson, a United States Senator from Wisconsin, spoke to a crowd gathered in Denver on April 22, 1970. [[6]](#footnote-7)6 Nelson, one of the main backers of a new event called Earth Day, encouraged his audience to elect a Congress that would "build bridges between our citizens and between man and nature's systems." [[7]](#footnote-8)7 Americans did. On a federal level, the Clean Water Act, the Safe Water Drinking Act, the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act were all enacted or amended between 1969 and 1973. [[8]](#footnote-9)8 Water, as usual, was a particularly contentious issue. Western states were long accustomed to managing in-state water issues (compacts and equitable apportionments aside), but they saw in the federal environmental movement a threat to a century of established water allocation. [[9]](#footnote-10)9 In addition, concern was **[\*371]** growing in ***Colorado*** that increased transbasin diversions would dewater headwater streams on the West Slope and that required water bypasses weren't protectable downstream as against other diverters. [[10]](#footnote-11)10 To demonstrate state effort on environmental issues without compromising the prior appropriation system, ***Colorado***, led by farmer and legislator Fred Anderson, introduced and passed Senate Bill 97, establishing the state's Instream Flow Program. [[11]](#footnote-12)11

In Senate Bill 97, the General Assembly "recognized the need to correlate the activities of mankind with some reasonable preservation of the natural environment", [[12]](#footnote-13)12 language strikingly similar to Nelson's Denver Earth Day speech three years previous. To accomplish that balance, the legislature created two distinct authorities within the ***Colorado*** Water Conservation Board - to appropriate and to acquire, "waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree." [[13]](#footnote-14)13 ***Colorado*** was one of the first states to adopt such a law. [[14]](#footnote-15)14

Today, the CWCB has appropriated water on 9,661 miles of stream, 24.5 percent of ***Colorado***'s perennial ***river*** and streams, and has acquired water under eight short-term leases, three long-term leases, and thirty permanent acquisitions of senior water rights and interests in water. [[15]](#footnote-16)15

Although the expansiveness of the program has grown and shrunk and grown again over the last forty-four years - with many of those iterations described here - the CWCB's broad authorities to protect and restore water to ***rivers*** have remained essentially the same: (1) to appropriate new instream flow water rights to preserve the natural environment to a reasonable degree, each with a priority date based on the CWCB's public demonstration of its intent to make the appropriation; and (2) to acquire water, water rights, or interests in water, and apply it to instream flow use in amounts it determines appropriation to preserve or improve the natural environment. [[16]](#footnote-17)16

The two authorities provide different benefits. Instream flow appropriations function to keep ***river*** and stream levels as they are at the time of the appropriation (although contested appropriations can result in negotiated decrees that adjust flow rates). Appropriations, although junior, produce real protections - they routinely prevent future withdrawals from ***rivers*** that would cause levels to dip below minimum flows. For example, in the winter of 2015 the CWCB placed a call for its instream flow water right on the upper ***Colorado*** ***River***, calling out junior snowmaking water rights on the upstream Fraser ***River***. [[17]](#footnote-18)17 **[\*372]** In addition, instream flows require senior water right holders to maintain decreed instream flow rates when they change water rights from an existing use to a new use in a Water Court proceeding. Despite their protective utility, appropriations are limited in their restorative effect. Because appropriations rely on creating a water right out of water available at the time of the appropriation, the State cannot revive a dry section of a ***river*** with an appropriation. If there's no water in a ***river***, there's no water for an appropriation - even for an instream flow.

How then is water restored to thirsty ***rivers*** under ***Colorado***'s Instream Flow Program? From its inception, the Instream Flow Program has had the authority to acquire senior water rights and to change those senior water rights through a typical change process to add instream flow as a use. [[18]](#footnote-19)18 Reallocation of water from the original use to new uses through a change case proceeding has occurred since at least 1891. [[19]](#footnote-20)19 As in many cases, the Instream Flow Program has looked at the tools available to consumptive users and applied them to instream flows. Under the available statutory change of water right processes, the new use retains the senior priority. [[20]](#footnote-21)20 With acquired water, ***rivers*** formerly swept by senior diversions may keep fish wet at crucial times. More robust acquisition efforts can restore fisheries or protect them during drought. Until 2008, the CWCB had no dedicated funding to use to buy water, and so most acquisitions have relied on donations of water into the program. [[21]](#footnote-22)21

The manner in which the CWCB may acquire water is broad. The statute takes a "kitchen sink" approach [[22]](#footnote-23)22 , and to date the CWCB has entered into long-term and short-term leases, a trust agreement, a permanent split season-use agreement, and numerous permanent fee-simple transfers. [[23]](#footnote-24)23 Few look the same because the terms of the transfer are driven by the water right owner's needs. An agreement with the City of Boulder, for example, allows the City to pull water out of the CWCB's program in case of drought. [[24]](#footnote-25)24 Many agreements also permit the re-use of the historical consumptive use downstream of the protected stream reach. [[25]](#footnote-26)25

A key component of both appropriations and acquisitions is the recommendation **[\*373]** by the CWCB's sister agency and built-in wildlife biological consultant, ***Colorado*** Parks and Wildlife (CPW). [[26]](#footnote-27)26 CPW has an instream flow coordinator position who works as a liaison between the CWCB and the fish biologists at CPW and who specializes in quantifying the specific amount of water necessary for new appropriations to preserve the natural environment to a reasonable degree. [[27]](#footnote-28)27 The CPW instream flow coordinator also quantifies the amount of water that is appropriate for acquisitions to preserve or improve the natural environment to a reasonable degree. [[28]](#footnote-29)28 This includes on-the-ground measurements of existing flow and stream channel dimensions, a survey of the species present, and a biological quantification of the flows appropriate to preserve or improve the natural environment to a reasonable degree. [[29]](#footnote-30)29 To make legal the appropriation or acquisition of water as a beneficial use, the CWCB relies upon CPW's biological analysis to support the ecological "need' for the water.

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). AGE OF CHALLENGES

A. Constitutionality

The CWCB's director from 1958 to 1979, Felix Sparks, and his attorneys and technical staff, took this newfound charge in 1973 to balance human needs with the environment and set about appropriating the first instream flow water rights. [[30]](#footnote-31)30 The first appropriated instream flows sought to protect required bypasses from federal transbasin water projects, mostly in the Roaring Fork basin. [[31]](#footnote-32)31 The challenge to the program came when the CWCB voted 8-4 to appropriate flows on the Crystal ***River***, among others, without a federal project water bypass nexus, and asked the Water Court for a decree protecting up to 100 cubic feet per second ("cfs") in the summer with a 1975 priority. [[32]](#footnote-33)32

The ***Colorado*** ***River*** Water Conservation District, which had lost its own attempt to appropriate instream flows a decade before, opposed the application. [[33]](#footnote-34)33 The Water Court ruled in favor of the CWCB, and the ***River*** District appealed to the ***Colorado*** Supreme Court, attacking the constitutionality of the Instream Flow Program and its technical flow quantification process. [[34]](#footnote-35)34 The ***Colorado*** Supreme Court affirmed the Water Court ruling and the constitutionality of the statute establishing the Program - thus establishing the first stand-alone instream flow water rights in the state. [[35]](#footnote-36)35 The Instream Flow Program survived **[\*374]** its first challenge, but more would come from both the courts and the legislature.

B. Enforceability of an Instream Flow Water Right

Although now established as constitutional, instream flow rights faced their next challenge in the question of whether they are enforceable. That is, does an instream flow water right hold the same status as a more traditional water right, and is thus protectable against injury by another water user? This question came to a head in the 1990s, when the City of Central filed a series of applications with the Division 1 Water Court to meet its future water demands, seeking water rights changes, an augmentation plan, conditional water rights, and exchanges. [[36]](#footnote-37)36

Under Central's application, Central would divert under a priority junior to an existing instream flow on North Clear Creek and replace those out-of-priority diversions with substitute supplies farther downstream, shorting the middle portion of an instream flow and thus, from the CWCB's perspective, cause injury. [[37]](#footnote-38)37 The CWCB asked for protective terms in Central's augmentation plan decree, Central refused in part, and the Water Court found in favor of Central. [[38]](#footnote-39)38 The CWCB then appealed to the ***Colorado*** Supreme Court. [[39]](#footnote-40)39

The Supreme Court reversed the Water Court ruling, holding that "Instream flow or lake levels rights are no different in concept from other appropriative rights. [[40]](#footnote-41)40 They must be decreed to be administered; are given a fixed priority date, a specified flow rate of volumetric quantity, time and place of use; and are administered like any other water rights, but no means of diversion is required." [[41]](#footnote-42)41 Preventing the CWCB from protecting existing instream flows from injury would frustrate the clear purpose of the legislature in creating instream flows. [[42]](#footnote-43)42 Instream flows are therefore entitled to protective terms and conditions as legally enforceable water rights - thus protecting stream conditions in changes of water rights proceedings, as well as applications for plans for augmentation and exchanges. [[43]](#footnote-44)43

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). CWCB Exclusivity

A. Direct Flow Appropriations

Today, the CWCB has the express "exclusive authority [to appropriate] such waters of natural streams and lakes." [[44]](#footnote-45)44 And "in the adjudication of water rights pursuant to [37-92-102(3)], no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a **[\*375]** stream channel between specific points." [[45]](#footnote-46)45 The exclusive authority language has been in the statute since 1987, when Senate Bill 212 clarified who could actually hold instream flows. [[46]](#footnote-47)46 Over the years this has been a lively conversation between water users and the CWCB in the courts and in the legislature.

As early as 1963, the General Assembly delegated authority to the ***Colorado*** ***River*** District "to file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish." [[47]](#footnote-48)47 When the ***River*** District attempted to exercise this authority in the White ***River*** basin, the ***Colorado*** Supreme Court dispatched that attempt in a brief opinion in 1965 holding that no water right could be created without diversion. [[48]](#footnote-49)48

After Senate Bill 73-97 was enacted, a group of water users on Illinois Creek in Water Division 4 began filing for instream flow water rights. [[49]](#footnote-50)49 The Water Court granted the water rights, ruling that Senate Bill 73-97 grants the CWCB new authority to file for instream flows but does not limit any other party from doing the same; [[50]](#footnote-51)50 the elimination of the diversion requirement applied to all appropriators. [[51]](#footnote-52)51 The Water Court did provide for one limitation: these decrees could only be granted in stream reaches upstream of all other existing water rights. [[52]](#footnote-53)52

One decree, Case No. W-1987, was ultimately challenged at the ***Colorado*** Supreme Court in 1992 by Arapahoe County. [[53]](#footnote-54)53 In 1990, Arapahoe County, owner of junior water rights in the Taylor ***River*** basin, asked the Water Court to vacate W-1987. [[54]](#footnote-55)54 It claimed the Water Court lacked subject matter jurisdiction to grant the decree because W-1987 was actually a riparian right, and that notice at the time of the original proceeding was insufficient. [[55]](#footnote-56)55 The Water Court dismissed Arapahoe's complaint with prejudice. [[56]](#footnote-57)56

When Arapahoe (and others) appealed, the ***Colorado*** Supreme Court, although acknowledging that Arapahoe "makes some compelling arguments that the 1974 court misconstrued Senate Bill 97", held that addressing that interpretation was unnecessary to find that the Water Court had subject matter jurisdiction. [[57]](#footnote-58)57 The Court held that even "if the Water Court erred and did in fact decree a private instream flow right, this would simply constitute legal error vulnerable **[\*376]** to reversal upon appeal, but would not constitute an overstepping of jurisdictional authority." [[58]](#footnote-59)58 The Court also found the original resume notice was valid, and so any collateral attack on W-1987 was barred by [*section 37-92-304(10), C.R.S.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G2-00000-00&context=1516831) (1990), upholding the Water Court's ruling. [[59]](#footnote-60)59

Rural water users were not alone in pursuing in-***river*** water uses in the 1980s. In 1986, the City of Fort Collins filed for a water right claiming 55 cfs for "municipal purposes, including recreational, piscatorial, fishery, wildlife and other beneficial uses ..." in the Cache La Poudre ***River***. [[60]](#footnote-61)60 Fort Collins initially claimed the diversionary structure was the Poudre ***River*** corridor. [[61]](#footnote-62)61 The CWCB, among others, objected, and in 1988 Fort Collins amended the application to list two structures that would control the flow of water in the Poudre, the Nature Dam and the Power Dam, thereby distinguishing the claimed in-***river*** water rights from an instream flow (which requires no diversion or control structure). [[62]](#footnote-63)62 The CWCB settled out, but Thornton and others stayed in, resulting eventually in a Water Court decree that gave Fort Collins a water right for the Nature Dam but not for the Power Dam. [[63]](#footnote-64)63 Thornton and Fort Collins each filed appeals, and eventually both water rights were granted in Fort Collins' favor. [[64]](#footnote-65)64

After Fort Collins' original application, the legislature passed Senate Bill 212 to clarify the CWCB's exclusive authority to keep in-***river*** uses within the state agency. But Fort Collins' victory had carved out a different kind of in-***river*** water right that was distinguishable from an instream flow. The victory led to similar in-***river*** requests from five additional communities, and finally resulted in the creation of the State's Recreational In-Channel Diversion program. [[65]](#footnote-66)65

The above cases dealt with appropriations of water to be left in ***rivers***. [[66]](#footnote-67)66 There are many diversions of water into ditches for private aesthetic, piscatorial, and recreational uses. [[67]](#footnote-68)67 The ***Colorado*** Supreme Court issued a decision on these so-called "fish ditches" in 2015, holding that a private entity's aesthetic, recreation, and piscatorial uses of water in a ditch do not qualify as beneficial uses. [[68]](#footnote-69)68 The legislature responded in 2017, passing House Bill 17-1190, limiting the applicability of the holding to conditional or absolute appropriations made after July 15, 2015. [[69]](#footnote-70)69

**[\*377]**

B. Storage Releases

The use of stored water for instream flow purposes gives the CWCB and its partners the flexibility to release water at the most crucial times for ***rivers*** and aquatic species. [[70]](#footnote-71)70 On the Alamosa ***River***, a ***river*** decimated by cyanide leaching from a gold mine upstream, the CWCB and the Alamosa RiverKeepers purchased two water rights, and through an agreement with an irrigation company, now store that water throughout the irrigation season. [[71]](#footnote-72)71 Each year, when flows begin to drop in the Alamosa, the CWCB calls for the release of its water to extend the number of days the ***river*** has healthy flows for fish. [[72]](#footnote-73)72 Recently, a bait and tackle shop opened in Capulin as locals rediscovered fishing in their local ***river***. [[73]](#footnote-74)73

This project is housed in the Instream Flow Program, but there are examples of private or other public entities using stored water to restore flows to ***rivers***. ***Colorado*** courts have analyzed stored water in this context differently than they have analyzed direct flow.

Case No. 4-86CW202 was a consolidation of two applications filed by the Upper Gunnison ***River*** Water Conservancy District ("the District") related to how the District delivered water out of Taylor Park Reservoir through the Aspinall Unit to the Gunnison Tunnel for the Uncompahgre Valley Water Users Association ("UVWUA"). [[74]](#footnote-75)74

Before the construction of the Aspinall Unit (Blue Mesa, Morrow Point, and Crystal Reservoirs), Taylor Park Reservoir would make releases to help satisfy water needs at the Gunnison Tunnel. [[75]](#footnote-76)75 These releases "destroyed fish habitats and spawning areas and at times endangered persons seeking to fish" because of their irregularity and intensity. [[76]](#footnote-77)76 After the Aspinall Unit was built, which helped manage flow, the District and several other parties including the United States and the UVWUA entered into an agreement in 1975 that detailed optimum flow rates for fish between Taylor Park and Blue Mesa, ranging from 100-150 cfs from mid-October to March, 300-500 cfs from April to June, and 500 cfs from July to mid-October. [[77]](#footnote-78)77

After the 1975 agreement, the District filed for additional storage in Taylor Park Reservoir in 1986, using the 1975 agreement as the date of appropriation **[\*378]** for the added storage. [[78]](#footnote-79)78 In its application, the District sought to count water released for fish habitat as a beneficial use, and thus receive storage credit for those releases. [[79]](#footnote-80)79 The Water Court agreed with the District, so several opposers appealed that ruling (among others) to the ***Colorado*** Supreme Court. [[80]](#footnote-81)80

Before the Court, Arapahoe County claimed that the Water Court's decision to allow releases for fish pursuant to the 1975 agreement to be credited as appropriated storage in Taylor Reservoir impermissibly granted an instream flow right to the District. [[81]](#footnote-82)81 The Court disagreed, upholding the Water Court decree. [[82]](#footnote-83)82 The Court held the "the right to appropriate water for ultimate beneficial use by diversion or control" is distinct from and does not conflict with appropriating for an instream flow. [[83]](#footnote-84)83 Instead, the District appropriated water generally for storage and subsequent releases for beneficial uses downstream pursuant to the 1975 agreement. [[84]](#footnote-85)84 Finally, the Court held because CWCB minimum instream flow appropriations are "sufficient only to protect fish species for short periods of time," and because the District's flow agreement would enhance the fishery "to a substantial degree throughout the year," the appropriations were therefore distinct. [[85]](#footnote-86)85 The Court upheld the District's releases as beneficial uses and included those releases in its storage credit. [[86]](#footnote-87)86

This issue of whether water diverted into storage and then released should then be protected downstream remains contested. [[87]](#footnote-88)87 However, the ability to deliver and protect water out of reservoirs outside of the Instream Flow Program forms the backbone of efforts to deliver water to the endangered fish reach of the ***Colorado*** ***River*** near Palisade. It is also vital to smaller projects, like the City of Steamboat Springs and the ***Colorado*** Water Trust's 2016 project to deliver municipal water from Stagecoach Reservoir to the City's wastewater treatment plant outfall as a lawful municipal use. [[88]](#footnote-89)88

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). Reduction in Instream Flow Program Authority - Conditional Water Rights Transfers

Until 1994, the CWCB's authority was silent as to whether it could acquire conditional water rights. Conditional water rights are placeholder water rights that allow a water user to get in line in the priority system upon meeting the **[\*379]** necessary legal standards without having to make the actual diversion and application of water to the contemplated beneficial use. [[89]](#footnote-90)89 In 1987, The Nature Conservancy ("TNC") received a donation of 300 cfs of a total 800 cfs conditional water right from The Pittsburgh and Midway Coal Mining Company. Under a 1990 agreement, TNC donated that water right to the CWCB for instream flow purposes. In Case No. 92CW107, the CWCB applied to change the conditional water right to an absolute instream flow water right in the Gunnison ***River*** from the Gunnison Tunnel to the its confluence with the North Fork of the Gunnison, receiving a decree in 1995. [[90]](#footnote-91)90

Opponents of the acquisition immediately saw the potential for water users to perfect conditional water rights by transfers to the CWCB without ever having had to apply that conditional water to a beneficial use. So after the donation agreement was signed, but before the Water Court issued the decree, the General Assembly passed Senate Bill 94-54, limiting the CWCB's ability to acquire conditional water rights to specific conditions related to federally endangered species. [[91]](#footnote-92)91 Eventually, that exception was eliminated as well. [[92]](#footnote-93)92

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). Instream Flow Program Expansion Attempts - Failed

A. Efficiency Transfers

What if an irrigator could line her ditch, grow the same crop, and transfer any water saved during delivery to the Instream Flow Program, protecting only the historical diversion amount from the headgate to the point of return flow accrual? The General Assembly has tried at least six times to explicitly allow a water user to improve the efficiency of their water delivery or application system and then transfer that saved diversion water to a new use. [[93]](#footnote-94)93 This is separate **[\*380]** water from saved consumptive use transfers, which undergirds nearly every water right transfer in ***Colorado***. [[94]](#footnote-95)94 Five of the six attempts died in committee. [[95]](#footnote-96)95 Governor Hickenlooper vetoed the other in 2014. [[96]](#footnote-97)96

B. Privately-Held Instream Flows

Although the privately-held direct flow instream flows in Division 4 remain an odd wrinkle in time, talk of explicitly allowing private individuals to hold instream flows to expand flow protections efforts in the state most recently boiled over into proposed legislation in 2002. [[97]](#footnote-98)97 Supporters believed allowing anyone to protect water in ***rivers*** would increase the breadth of the program. Senate Bill 156 as introduced allowed owners of absolute water rights to change their water rights to "sustain or enhance uses for recreation, fish and wildlife, scenic beauty, or ecologically purposes." [[98]](#footnote-99)98 It did not survive as introduced. Senate Bill 156 became a compromise bill that expanded the amount of water that could be changed for instream flow purposes by the CWCB - described more fully below. The CWCB's exclusive authority remained intact. [[99]](#footnote-100)99

[*VII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831). Instream Flow Expansions - Successful

A. Acquisition Clarification and Addition of "Improve'

Under the original 1973 Instream Flow Program scheme, the CWCB had the authority "to appropriate in a manner consistent with sections 5 and 6 of article XVI of the statute constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable decree." [[100]](#footnote-101)100

From the outset, the CWCB could appropriate or acquire, but only to preserve the natural environment to a reasonable degree. The legislature had enlarged the beneficial use definition in the statute by adding "beneficial use shall **[\*381]** also include the appropriation by the State of ***Colorado*** in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams … as are required to preserve the natural environment to a reasonable decree." [[101]](#footnote-102)101 In 1973, the word "minimum" was included in the definitions section for appropriations, but not in § 37-92-102(3). The word "minimum" was taken by some to mean "enough to keep the backs of fish under water." [[102]](#footnote-103)102

"Minimum" only entered § 37-92-102(3) in 1987 under Senate Bill 87-212. Senate Bill 87-212 limited both the CWCB's appropriation and acquisition authorities to "minimum stream flows." [[103]](#footnote-104)103 Over the years, the legislature imposed more structure to the program around notice and conditional water rights; however, CWCB's fundamental authorities remained generally unchanged until 2002.

As described above, ***river*** advocates' efforts to fundamentally change the Instream Flow Program to allow private individuals to change their water rights to instream flow hit the ground with the introduction of Senate Bill 156. The introduced bill met heavy resistance, and the legislature spent the session coming to a negotiated end to the privatization push, passing Senate Bill 156 in another form. [[104]](#footnote-105)104 The bill removed the "minimum stream flow" restriction from the CWCB's acquisition authority and replaced it with the still-current language: "in such amount as the board determines is appropriate for stream flows." It also added authority to "improve" the natural environment. As it happened, the improve authority had an immediate impact on a project occurring at the same time.

In 2001, the San Juan Resource Conservation and Development Council ("SJRCDC") offered to donate a 15 cfs water right off of Mineral Creek in the San Juan Mountains to the CWCB for instream flow use. [[105]](#footnote-106)105 SJRCDC determined that water diverted under the Carbon Lake ditch was picking up mining pollutants and seeping those into Mineral Creek, causing damage to the creek's aquatic resources. [[106]](#footnote-107)106 SJRCDC took the lead in purchasing the water right, and then offered it as a donation to the CWCB in 2001.

As always, ***Colorado***'s wildlife agency (at the time, the Division of Wildlife) went to work to determine the amount of water that would preserve the natural environment in the restoration reach of Mineral Creek. Those numbers came back between 2.5 and 6.6 cfs, well below the 15 cfs offered by SJRCDC. Under the statutory scheme as it existed in 2001, the CWCB would have to leave the difference, up to 12.5 cfs, on the table, frustrating the donor's intent and efforts **[\*382]** to protect more water in Mineral Creek. [[107]](#footnote-108)107

Before the deal was entirely finalized, Senate Bill 156 passed, and the CWCB overnight gained the authority to protect more than the minimum amount of water in a ***river***. Carbon Lake Ditch became the first transfer into the Instream Flow Program to utilize the "improve" authority. In 2003, the CWCB and SJRCDC amended the original donation agreement to allow for the Board to accept the entire 15 cfs into the program. [[108]](#footnote-109)108

While the term "improve" remains statutorily undefined, the removal of the minimum limit on the CWCB's acquisition authority has freed up the CWCB to acquire water rights to preserve and improve to levels that it determines to be "appropriate".

The "improve" authority is critical. It allows instream flow acquisitions to restore flows to dewatered streams to a higher level than the minimum, and it can bring additional flow protection on top of an existing junior, appropriated instream flow. How does this work in practice? Take, for example, the following hypothetical that includes the improve authority: the CWCB appropriated a 1980 instream flow right on a ***river***, preserving the natural environment up to 5 cfs. Later, the CWCB acquired a 1900, 3 cfs water right in the same reach to preserve and improve the natural environment. In drier years, the 5 cfs water right will be called out, but the 3 cfs acquisition keeps the ***river*** wet thanks to its senior priority. In wetter years, the CWCB can operate the 5 cfs and 3 cfs instream flow rights independently, producing a combined 8 cfs of flow protection. [[109]](#footnote-110)109 Analyzing the same hypothetical in 2001 before the CWCB's improve authority was created, the acquired 3 cfs water right could only protect water up to the 5 cfs preserve limit. Therefore, in wetter years, if the 5 cfs water right was fully satisfied, the CWCB could not protect the additional 3 cfs.

B. Protections for Water Users - Removing Disincentives

As interested water users investigated the potential for long-term leases into the CWCB's Instream Flow Program, one issue kept popping up: during the term of a lease, the local water commissioner would look at the leased water right's headgate, note no water diverted, and record a zero into the water rights diversion records. A long-term lease would collect zeros for every year water was left in the stream, and so the lessor would see a gradual decline in transferable water under a subsequent change. Potential lessors were hesitant to devalue their water rights in this way.

To address this issue, the General Assembly passed HB 08-1280. The bill outlined further requirements for how the CWCB would analyze and enter into leases, and provided that in a change decree adding instream flow as a use, the historical consumptive use would be quantified, and that quantification "shall not result in a reduction of the historical consumptive use of that water right during the term of the leases or loan, except to the extent such reduction is **[\*383]** based upon actual amount of water available under said rights." [[110]](#footnote-111)110 A collection of zeros in a diversion record would no longer be counted against a water right leased to the CWCB.

Temporary, administratively approved changes of water rights have these protections as well. Section 37-83-105(c) provides similar protections for short-term, administratively approved loans of water to the CWCB. [[111]](#footnote-112)111 Moreover, the ***Colorado*** Supreme Court has noted that these temporary changes in water rights deserve such protection; otherwise those penalties would prevent water right owners from taking advantage of them. [[112]](#footnote-113)112 HB 08-1280 also provided protections against abandonment when water is enrolled in the Instream Flow Program. [[113]](#footnote-114)113

C. Funding

Until 2008, the CWCB had no dedicated fund to acquire water rights and relied instead on private groups like TNC and the ***Colorado*** Water Trust, or on water providers like the Mt. Werner Water & Sanitation District and the City of Fort Collins to donate water to the program. The General Assembly - understanding having an acquisition program with no money was like a car with no gas - passed House Bill 08-1346, creating an annually updating one million dollar fund for acquisitions and transaction costs. The legislation required the CWCB to promulgate a spending policy for the fund, now known as Policy 19. [[114]](#footnote-115)114 The funding has been used to buy permanent interests of water in the Gunnison basin and for leases in the ***Colorado*** ***River*** basin.

[*VIII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T502-8T6X-7323-00000-00&context=1516831). Today's Expanding Acquisition Program

A. Diversion Transfer and Remarket

To date, the CWCB and its partners have completed forty one transactions transferring water rights into the State's Instream Flow Program, resulting in approximately 621.12 cfs and 14,504.21 acre-feet ("AF") added to the state's ***rivers*** and protected under more senior priorities. [[115]](#footnote-116)115 The amount of water that can be transferred to a new use without injury to other water users is the "pattern of historic diversions and use under the decreed right for its decreed use at its **[\*384]** place of use." [[116]](#footnote-117)116 That pattern will become the true measure of the mature water right for change purposes, typically quantified in acre-feet of water consumed." [[117]](#footnote-118)117

Since the earliest instream flow transfers, the CWCB and its partners have interpreted, and Water Courts have confirmed, this bedrock provision of ***Colorado*** water law to allow for the protection of historical diversion amounts in the reach of stream between the headgate and point of return flows, and protection of historical consumptive use from the point of accrual of return flows down to a convenient or necessary stopping point. [[118]](#footnote-119)118 This practice makes sense in at least two respects. One, no water users in the diversion reach ever relied on the water historically diverted out of the stream, and therefore could not be injured by the practice of now bypassing that same water past their diversions. [[119]](#footnote-120)119 The diversion amount is, therefore, fully consumptive to the reach of the ***river*** upstream of the historical return flows. [[120]](#footnote-121)120 And two, in the case of an irrigation water right, the diversion amount of a water right is the historical consumptive use plus the owed return flows. So, in claiming the diversion amount as protected down to the point of return flows, the CWCB is simply delivering owed return flow water to downstream users to prevent injury. Often, the protectable diversion amount rate is twice that of the protectable historical consumptive use rate and represents the greatest benefit of a transaction.

Past the lower terminus of instream flow use, historical consumptive use is often remarketed into another use, particularly if an expanding ***river*** downstream ceases to need streamflow restoration as urgently. [[121]](#footnote-122)121

B. Split-Season Transfers

For most changes of irrigation water rights, lands under irrigation have been dried up permanently. [[122]](#footnote-123)122 Typically, a buyer will require the seller to record a dry-up covenant on the formerly irrigated land to ensure that a particular water right will never be used again on the property. This is evidence that the water right's use will not be enlarged.

However, with political willingness to find ways of improving the state's waterways while preserving ***Colorado***'s agricultural heritage, the CWCB and its partners have begun exploring deficit irrigation techniques. [[123]](#footnote-124)123 For example, Western ***Rivers*** Conservancy, the Water Trust, and CWCB's McKinley Ditch project in the Gunnison basin is close to receiving a decree that contemplates **[\*385]** four different approved water management practices. [[124]](#footnote-125)124 Historically, this water right irrigated a nearly two hundred-acre high-altitude ranch to produce one cutting of grass hay per season. [[125]](#footnote-126)125 Afterwards, cattle would be left to graze off the remaining forage. [[126]](#footnote-127)126 By applying less water in the late season, this project is what many commentators call deficit irrigation, whereby consumptive use water is saved through an early cessation of irrigation. [[127]](#footnote-128)127 The Water Trust is studying the impacts to the grass hay crop as a result of the reduced irrigation with the help of ***Colorado*** State University. [[128]](#footnote-129)128

To give some certainty to the Water Trust, the future irrigator, and the CWCB, the partners have developed a streamflow forecasting model that will predict streamflows in the basin to determine that year's need for instream flow water. Using that forecast, the partners will choose one of the following water management scenario to use for that year: (1) full season irrigation, (2) full season instream flow, (3) irrigation through June, or (4) irrigation through July. To the knowledge of the Water Trust it will be the first permanent split (also known as partial) season agricultural and instream flow water sharing decree in the western United States.

C. 3-in-10 Loans to the CWCB

During the 2002 drought - which brought fire, fish kills, and emergency bucket brigades of people moving fish from dry reaches of ***rivers*** to ***rivers*** with water - water rights owners approached the CWCB looking to act quickly to leave their water in their local ***river***. Faced, however, with a potential two-year Water Court change case, the event highlighted that no mechanism was in place for willing water rights owners to act quickly to preserve their ***rivers*** in droughts.

In a swift bipartisan response, the General Assembly passed House Bill 1320 the next year, authorizing temporary loans of water rights for instream flow use during times of drought. [[129]](#footnote-130)129 A year later, the drought emergency requirement was removed. [[130]](#footnote-131)130 Instead of a longer and more expensive Water Court process, the state and division engineer are tasked with reviewing the change of water right under the injury standard, and are charged to do so within twenty days of notice of the application. [[131]](#footnote-132)131 The tool, however, remains limited in temporal and geographical scope. [[132]](#footnote-133)132 Water loaned can only be used three years out of ten, for **[\*386]** a maximum of 120 days in any given year. [[133]](#footnote-134)133 Once used, the approval can never be renewed. [[134]](#footnote-135)134

Geographically, water may not be loaned to the CWCB unless there is an existing instream flow present and that instream flow is water short (i.e. does not have a full supply legally and physically available to it). [[135]](#footnote-136)135 Additionally, water loaned to an unmet instream flow cannot be protected in amounts greater than the unmet instream flow's decreed flow rate. These restrictions come in part because of the speed at which CWCB staff may approve such loans and ask for ratification from their Board afterwards. [[136]](#footnote-137)136 In essence, because a decreed instream flow is already present on a particular reach, the CWCB can skip the need analysis and recommendation from ***Colorado*** Parks and Wildlife for the use of this new temporary loan of water. [[137]](#footnote-138)137

After approval in 2003, this tool sat unused on the shelf until 2012. Looking at bright red snowpack maps, foreboding a repeat of 2002's dry ***rivers***, the ***Colorado*** Water Trust partnered with the CWCB to create a statewide "Request for Water," in which the Water Trust asked willing water rights owners to submit offers on a confidential, standardized form, and then vetted those water rights for meeting the statutory criteria, for transferability, and for environmental benefit. [[138]](#footnote-139)138 That year, the Water Trust reviewed ninety-four offered water rights and completed leases with the CWCB on six of them. [[139]](#footnote-140)139 The next year, which began as a drought year, the Water Trust reviewed 130 water rights, and leased seven water rights with the CWCB. [[140]](#footnote-141)140

Part of the roll out of the effort included outreach to law firms, engineering firms, large water suppliers, and other water agencies to fully explain the program and to shake the trees for offers. During outreach to the Division of Water Resources ("DWR"), the Water Trust and CWCB asked DWR staff, the agency that would eventually review the temporary loan applications, how the partners could speed up the process. One of their specific recommendations was to avoid submitting technically challenging applications, such as applications for split-season, if the Water Trust and the CWCB wanted their fastest response. However, circumstances were such that some water users desired split-season use - they still needed to support cattle or other ranch operations on their property. The water right engineering consultants and Water Trust and CWCB staff worked to prove non-injury to the satisfaction of DWR, whose staff responded with expedience in kind.

**[\*387]** These new tools required in-house administration changes at DWR. When water users lease or loan their water to the Instream Flow Program, there are specific statutorily provided protections for those water rights from diminishment of historical consumptive use and from abandonment. Without proper coding in DWR's records, a consultant reviewing a leased water right's records twenty years from now would not be alerted that the years in which the water was used in the Instream Flow Program do not count in that water right's record. CWCB and Water Trust staff have worked closely with the recordkeeping section of DWR to make sure those protections are enshrined properly and consistently in DWR's records.

D. Instream Flow Augmentation Plan

Augmentation plans are a statutory creation under the 1969 Water Right Determination and Administration Act, designed to allow for flexibility and reliability of new water uses in ***Colorado***'s over-appropriated ***river*** basins. [[141]](#footnote-142)141 Traditionally, a plan for augmentation has been viewed as a vehicle to allow a water user to divert water out-of-priority as long as a plan for replacing those out-of-priority diversions offsets those withdrawals. [[142]](#footnote-143)142 More broadly, the ***Colorado*** Supreme Court has viewed augmentation plans to be part of "a policy of maximum flexibility." [[143]](#footnote-144)143 The definition of an augmentation plan captures that flexibility: "a detailed program … to increase the supply of water available for a beneficial use" by using a variety of different means, including pooling water or providing substitute supplies. [[144]](#footnote-145)144

What makes augmentation plans even more flexible is their ability to accept previously unidentified sources of supply under procedures that can be set out in the original decree for the plan. [[145]](#footnote-146)145 These procedures can often just require notice and comment with an administrative approval - sharply reducing the amount of time required to add further supplies when needed. [[146]](#footnote-147)146

Since 1986, the CWCB has had the authority to file for plans for augmentation if the Board determines a plan is "necessary or desirable" for using acquired water, water rights, or interests in water. [[147]](#footnote-148)147 The CWCB and Water Trust are working with water users on the Cache La Poudre ***River*** to explore an instream flow augmentation plan in that basin to address seasonally dry reaches of ***river***. [[148]](#footnote-149)148 What makes the idea particularly attractive in that basin and other developed basins is the potential availability of already-decreed augmentation water which might be conveniently used in such a voluntary, market-based program.

**[\*388]**

[*IX*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T532-D6RV-H381-00000-00&context=1516831). Other Kinds of Flow Restoration

The CWCB's Instream Flow Program is a robust and powerful way to restore and protect streamflows within ***Colorado***'s prior appropriation system. It is not the only way. Entities ranging from the water users in the ***Colorado*** ***River*** basin [[149]](#footnote-150)149 and Arkansas ***River*** basin [[150]](#footnote-151)150 to reservoir owners in the San Luis Valley [[151]](#footnote-152)151 have all found ways to improve their ***rivers*** and protect the economic values associated with healthy, flowing ***rivers***. Below are some of the evolving ways individual water rights can restore flow to ***rivers***.

A. Water Conservation Programs

As discussed earlier, one of the several previous attempts at explicitly allowing the transfer of efficiency savings to the Instream Flow Program was not wholly unsuccessful. In 2013, State Senator Gail Schwartz of the Roaring Fork Valley championed one such bill, Senate Bill 13-19. [[152]](#footnote-153)152 In the end, the language allowing transfers of savings to the CWCB was removed, but protections for appropriators who wished to reduce their use remained. [[153]](#footnote-154)153 Valid now in Water Divisions 1, 2, 3, 4, 5, and 6, [[154]](#footnote-155)154 Water Conservation Programs allow an irrigator to decrease or forego diversions while participating in an approved water conservation program and be freed - at least for some years - from the "use it or lose it" pressures of ***Colorado*** water law. [[155]](#footnote-156)155 Once these protections are in place, water users have the freedom to experiment with efficiencies, reducing diversions in drought years, or other water management scenarios that might have been considered too risky without statutory protections from abandonment and diminution of historical consumptive use. [[156]](#footnote-157)156

The bill is, at its root, an agricultural bill - the bill does not protect water in ***rivers***, it solely gives irrigators cover when they decide to manage their water **[\*389]** differently. But in certain circumstances it can be used for streamflow restoration. To receive protections against diminishment of historical consumptive use and abandonment, the reduced use must be the result of participation in a water conservation program approved or established by a variety of water-related agencies or local government. [[157]](#footnote-158)157 For example, the Water Trust has a project with the owner of a ranch in Grand County with relatively junior water rights. [[158]](#footnote-159)158 At times when the senior water users upstream are fully satisfied and water does flow downstream to the ranch, the ranch's water rights have the ability to sweep Willow Creek, disconnecting prime tributary habitat for fish from the mainstem of the ***Colorado*** ***River***. No transfer is necessarily needed to restore this connection - just less water use at crucial times. The ranch's owners, however, worried that not diverting their water right as much as possible put their water right at risk. The Water Trust helped the owner create a water conservation program, which was then submitted to and approved by the ***Colorado*** ***River*** Water Conservation District, an authorized entity under the statute. [[159]](#footnote-160)159

Water conservation programs are a key component of ***Colorado*** ***River*** Basin-wide water use conversations. The System Conservation Pilot Program created by major water users in the basin and operated through the Upper ***Colorado*** ***River*** Basin Commission intends to explore the legal and technical underpinnings of freeing up historical consumptive use to reduce the risk of a ***Colorado*** compact call. [[160]](#footnote-161)160 Water users who enroll in the program are required to reduce their consumptive use. Their water rights are not at risk because those water rights are enrolled in a water conservation program approved by the CWCB. Fourteen water users in ***Colorado*** reduced their use over 2015 and 2016 as a part of the pilot, all covered under water conservation program approved by the CWCB.

B. Downstream Transfers

In 2012, 2013, and 2017, the Water Trust and CWCB leased water from the Upper Yampa Water Conservancy District under the CWCB's temporary loan statute to fill in flow deficits to the CWCB's existing instream flow right on the Yampa ***River*** from Morrison Creek to Lake Catamount. [[161]](#footnote-162)161 That instream flow reach stretches only 5.4 miles and ends upstream of the City of Steamboat Springs. As July 4th approached in 2012, flows were reaching a nadir in town, nearing 40 cfs. The City imposes a voluntary closure of the ***river*** to tubing and **[\*390]** fishing at flows below 85 cfs, a threshold thought to indicate when fish may become stressed. [[162]](#footnote-163)162 With the warm holiday weekend approaching, the City was facing real economic and fish habitat challenges.

The Water Trust searched for a way to authorize DWR to administer the leased water farther down the ***river***, not just through the 5.4-mile segment below the reservoir. With water supplies so limited by the drought, Tri-State Generation & Transmission indicated they might have a need for additional supplies at their Craig Station Power Plant, ninety-two miles downstream of Stagecoach Reservoir. [[163]](#footnote-164)163 The Water Trust entered into a water use agreement with Tri-State for their use of the leased water at Craig, and that agreement permitted DWR to administer the released water from the end of the instream flow segment at Lake Catamount down the Yampa to Craig. [[164]](#footnote-165)164

C. Ag-to-Ag

Agricultural users have a special loan mechanism that allows for quick loans of agricultural irrigation water rights from one farmer or rancher to another on the same stream system upon the approval of the division engineer. [[165]](#footnote-166)165 This statute has been in place since the early 1900s, and was recently amended to allow for instream flow use as well (see 3-in-10 section above). [[166]](#footnote-167)166 But an ag-to-ag transfer could have streamflow benefits without a formal instream flow transaction. Moving irrigation in dry years from upstream farms to downstream farms restores water from the original point of diversion to the downstream new point of diversion.

[*X*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T552-8T6X-7328-00000-00&context=1516831). CONCLUSION

More and more, traditional water users are looking for opportunities to use their water in flexible ways, often with the added or express purpose of improving local ***river*** health. The motivation is not all environmental warm and fuzziness. Particularly on the West Slope, water users are realizing the economic value a running ***river*** has for their communities. Sometimes these efforts fall outside of the State's Instream Flow Program. In 2016, the City of Steamboat released more than five hundred acre-feet from storage for municipal uses, resulting in improved streamflows on the Yampa ***River*** during a low-runoff summer. [[167]](#footnote-168)167 Water users and suppliers on the Eagle ***River*** reduced their diversions during the 2012 drought to keep the Eagle wet. [[168]](#footnote-169)168 Other times these water users **[\*391]** look to the CWCB as the partner that has the statutory authority to deliver and protect water downstream as it flows downstream, to which the ***Colorado*** ***River*** Cooperative Agreement [[169]](#footnote-170)169 and a recent Denver Water [[170]](#footnote-171)170 acquisition agreement attest.

Through these projects, water users become aware of both the challenges and opportunities working on streamflow restoration and can and have helped expand those opportunities in legislation and policy. Senior water right holder involvement in streamflow restoration is absolutely vital. Indeed, inside ***Colorado***'s prior appropriation system, partnership with senior users is the only way for ***rivers*** to become a senior user once again.

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**End of Document**

1. 1 Staff Attorney, ***Colorado*** Water Trust. The legal opinions herein are solely the author's. The author thanks the Water Trust's former staffer Edalin Koziol and former legal interns Jonathan King, Rob Bullard, Alex Hayes, Alison Lipman, Cassidy Woodard, and Josh Boissevain for creating the Water Trust's Instream Flow Program legislative history library; the ***Colorado*** Water Trust; and in particular the University of Denver Sturm College of Law Water Law Review staff, Linda Bassi of the ***Colorado*** Water Conservation Board and Anne Janicki for reviewing drafts and imparting first-hand knowledge, and Amy Beatie for her support over the past seven years. [↑](#footnote-ref-2)
2. 2 See Act of Feb. 19, 1879, 1879 ***Colo.*** Sess. Laws 94-108, see also [*Santa Fe Trails Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 52 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) [↑](#footnote-ref-3)
3. 3 Act Concerning Water Rights, 1903 ***Colo.*** Sess. Laws 297-98. [↑](#footnote-ref-4)
4. 4 S.B. 73-97, 49th Gen. Assemb., 1st Reg. Sess (***Colo.*** 1973) (codified at [***Colo.*** *Rev. Stat.§§37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)(1973)). [↑](#footnote-ref-5)
5. 5 Szeptycki, L. & Pilz, D. ***Colo.*** ***River*** Basin Envtl. Water Transfers Scorecard 3 (Stanford Woods Inst. for the Env. 2017). The report notes, however, how far ahead of ***Colorado*** other western states like Oregon are. [↑](#footnote-ref-6)
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7. 7 Partial Text for Sen. Gaylord Nelson, Denver, ***Colo.***, Wisconsin Historical Society (April 22, 1970) [*http://www.nelsonearthday.net/docs/nelson\_26-18\_*](http://www.nelsonearthday.net/docs/nelson_26-18_) ED\_denver\_speech\_notes.pdf. [↑](#footnote-ref-8)
8. 8 Reed Benson, Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law, [*83 U.* ***Colo.*** *L. Rev. 675, 686 (2012).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:55WD-TRB0-00CV-N03S-00000-00&context=1516831) [↑](#footnote-ref-9)
9. 9 Id. [↑](#footnote-ref-10)
10. 10 Former CWCB Director Spurred Development of Program, InStream ***Colo.***, Oct. 1999 at 1; Steven J. Shupe, The Legal Evolution of ***Colorado***'s Instream Flow Program, 17 ***Colo.*** Law. 861, 861 (1988). [↑](#footnote-ref-11)
11. 11 Profile: Water Rights Leader Fred E. Anderson, InStream ***Colo.***, July 1998 at 5. [↑](#footnote-ref-12)
12. 12 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-13)
13. 13 S.B. 73-97, supra note 4. [↑](#footnote-ref-14)
14. 14 Sasha Charney, Decades Down the Road: An Analysis of Instream Flow Programs in ***Colorado*** and the Western United States 20 (2005). [↑](#footnote-ref-15)
15. 15 Instream flow Program, ***Colorado*** Water Conservation Board, [*http://cwcb.state.****co****.us/environment/instream-flow-program/Pages/main.aspx*](http://cwcb.state.co.us/environment/instream-flow-program/Pages/main.aspx) (last visited May 1, 2017). [↑](#footnote-ref-16)
16. 16 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-17)
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19. 19 See [*Strickler v.* ***Colorado*** *Springs, 26 P. 313 (****Colo.*** *1891).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2N10-0040-025T-00000-00&context=1516831) [↑](#footnote-ref-20)
20. 20 [*Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) [↑](#footnote-ref-21)
21. 21 H.B. 08-1346, 66th Gen. Assemb., Reg. Sess. (***Colo.*** 2008). Lack of funding was one of the main reasons a group of water attorneys and water engineers founded the ***Colorado*** Water Trust. [↑](#footnote-ref-22)
22. 22 See [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016) ("The board also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any government entity"). [↑](#footnote-ref-23)
23. 23 See Instream Flow Program: Completed Transactions, ***Colorado*** Water Conservation Board [*http://cwcb.state.****co****.us/environment/instream-flow-program/Pages/*](http://cwcb.state.co.us/environment/instream-flow-program/Pages/) CompletedTransactions.aspx (last visited May 1, 2017). [↑](#footnote-ref-24)
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25. 25 Id. [↑](#footnote-ref-26)
26. 26 [*2* ***Colo.*** *Code Regs.§§408-2 (6f) (2)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831), (11c) (2009). [↑](#footnote-ref-27)
27. 27 Id. [↑](#footnote-ref-28)
28. 28 Id. [↑](#footnote-ref-29)
29. 29 See ***Colorado*** Water Conservation Board, R2Cross, [*http://cwcb.state.****co****.us/technical-resources/R2CROSS/Pages/main.aspx*](http://cwcb.state.co.us/technical-resources/R2CROSS/Pages/main.aspx); see also R2Cross Efficient for Quantifying Instream Flows, InStream ***Colo.***, Jan. 1999 at 1. [↑](#footnote-ref-30)
30. 30 Former CWCB Director Spurred Development of Program, InStream ***Colo.***, Oct. 1999 at 1. [↑](#footnote-ref-31)
31. 31 Id. [↑](#footnote-ref-32)
32. 32 Judgment and Decree at 2-3, In re Roaring Fork ***River*** and Its Tributaries, No. 75W2720 (***Colo.*** Water Ct. Div. No. 5 June 26, 1978); Judgment and Decree at 2-3, In re Roaring Fork ***River*** and Its Tributaries, No. 75W2721 (***Colo.*** Water Ct. Div. No. 5 June 26, 1978). [↑](#footnote-ref-33)
33. 33 [***Colo.******River*** *Water Conservation Dist. v. Rocky Mountain Power* ***Co****., 406 P.2d 798, 799 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-34)
34. 34 Id. [↑](#footnote-ref-35)
35. 35 Id. [↑](#footnote-ref-36)
36. 36 [***Colo.*** *Water Conservation Bd. v. City of Central, 125 P.3d 424, 428 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-37)
37. 37 [*Id. at 429.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-38)
38. 38 [*Id. at 427.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-39)
39. 39 Id. [↑](#footnote-ref-40)
40. 40 [*Id. at 427-28.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-41)
41. 41 [***Colo.*** *Water Conservation Bd. v. City of Central, 125 P.3d at 438-39.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-42)
42. 42 [*Id. at 439.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-43)
43. 43 [*Id. at 438-39.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-44)
44. 44 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-45)
45. 45 Id. [↑](#footnote-ref-46)
46. 46 S.B. 87-212, 56th Gen. Assemb., Reg. Sess. (***Colo.*** 1987). [↑](#footnote-ref-47)
47. 47 [***Colo.*** *Rev. Stat. § 37-46-107(1)(j)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PR-00000-00&context=1516831) (2016). [↑](#footnote-ref-48)
48. 48 [***Colo.******River*** *Water Conservation Dist. v. Rocky Mountain Power* ***Co****., 406 P.2d 798, 800 (****Colo.*** *1965);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) S.B. 73-97 49th Gen. Assemb., Reg. Sess. (***Colo.*** 1987) eliminated the diversion requirement. [↑](#footnote-ref-49)
49. 49 Ruling of Water Referee at 2-4, In re Application for Water Rights of Kysar Triangle 2 Ranch, Inc., No. W-1985 (***Colo.*** Water Ct. Div. No. 4). [↑](#footnote-ref-50)
50. 50 Id. [↑](#footnote-ref-51)
51. 51 Id. [↑](#footnote-ref-52)
52. 52 Id. at 3. Although there are plenty of instream flows that exist among or downstream of headgates, administration remains a challenge, requiring proper measurement of water to the satisfaction of the local water users, the water commissioner, and the CWCB. [↑](#footnote-ref-53)
53. 53 [*Bd. of Cty Cmm'rs v. Collard, 827 P.2d 546, 547 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-54)
54. 54 [*Id. at 549.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-55)
55. 55 [*Id. at 547.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 [*Id. at 549.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-57)
57. 57 [*Id. at 551.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-58)
58. 58 [*Bd. of Cty Cmm'rs v. Collard, 827 P.2d at 551-52.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-59)
59. 59 [*Id. at 553.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-60)
60. 60 [*Thornton v. Fort Collins, 830 P.2d 915, 919 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-61)
61. 61 Id. [↑](#footnote-ref-62)
62. 62 [*Id. at 920*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-63)
63. 63 [*Id. at 921.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-64)
64. 64 [*Id. at 921-22, 933.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-65)
65. 65 Press Release, Holland & Hart, LLP, ***Colorado*** Board Adopts Rules for "Recreational In-Channel Diversion" Water Rights (March 22, 2002), [*https://www.hollandhart.com/****colorado****-board-adopts-rules-for-recreational-in-channel-diversion-water-rights*](https://www.hollandhart.com/colorado-board-adopts-rules-for-recreational-in-channel-diversion-water-rights); see[***Colo.*** *Rev. Stat. § 37-92-102(6)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2001). [↑](#footnote-ref-66)
66. 66 See [***Colo.******River*** *Water Conservation Dist. v. Rocky Mountain Power* ***Co****., 406 P.2d 798, 798 (****Colo.*** *1965);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [*Bd. of Cty Cmm'rs v. Collard, 827 P.2d 546, 557 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0H30-003D-9176-00000-00&context=1516831) [↑](#footnote-ref-67)
67. 67 See, e.g., [*St. Jude's* ***Co****. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 446 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-68)
68. 68 [*Id. at 451-52.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-69)
69. 69 H.B. 17-1190, 71ST Gen. Assemb., Reg. Sess. (***Colo.*** 2017). [↑](#footnote-ref-70)
70. 70 See, e.g., Alamosa ***River*** Keepers, ***Colorado*** Water Trust (Nov. 17, 2015) [*http://www.coloradowatertrust.org/programs/projects/alamosa-riverkeepers*](http://www.coloradowatertrust.org/programs/projects/alamosa-riverkeepers) (last visited April 4, 2017). [↑](#footnote-ref-71)
71. 71 Id. [↑](#footnote-ref-72)
72. 72 Alamosa ***River*** Receives Streamflow Restoration, Valley Courier (Nov. 17, 2015) [*http://www.coloradowatertrust.org/newsroom/alamosa-****river****-receives-streamflow-restoration*](http://www.coloradowatertrust.org/newsroom/alamosa-river-receives-streamflow-restoration) (last visited April 4, 2017). [↑](#footnote-ref-73)
73. 73 Id. Much of the restoration work has been conducted under Superfund. The restoration of flows was a small piece of the entire effort to improve the Alamosa ***River***. See Alamosa ***River*** Keepers, ***Colorado*** Water Trust (Nov. 17, 2015) [*http://www.coloradowatertrust.org/programs/projects/alamosa-riverkeepers*](http://www.coloradowatertrust.org/programs/projects/alamosa-riverkeepers) (last visited April 4, 2017). [↑](#footnote-ref-74)
74. 74 Findings, Conclusions and Judgment on the Merits of the Applications, In re The Upper Gunnison ***River*** Water Conservancy Dist., No. 86CW0202 (***Colo.*** Water Ct. Div. 4 Sep. 18, 1990). [↑](#footnote-ref-75)
75. 75 [*In re Applications for Water Rights of Upper Gunnison* ***River*** *Water Conservancy Dist., 838 P.2d 840, 844 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-76)
76. 76 Id. [↑](#footnote-ref-77)
77. 77 [*Id. at 845-46.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 [*Id. at 846.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-79)
79. 79 Id. [↑](#footnote-ref-80)
80. 80 [*In re Applications for Water Rights of Upper Gunnison* ***River*** *Water Conservancy Dist., 838 P.2d at 846-47.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-81)
81. 81 [*Id. at 853.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-82)
82. 82 Id. [↑](#footnote-ref-83)
83. 83 [*Id. at 854.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-84)
84. 84 Id. [↑](#footnote-ref-85)
85. 85 Id. [↑](#footnote-ref-86)
86. 86 Id. [↑](#footnote-ref-87)
87. 87 The conversation on storage continues. House Bill 17-282 attempted to simplify a Water Court procedure for a reservoir owner to dedicate releases to the Instream Flow Program. [↑](#footnote-ref-88)
88. 88 See Stagecoach Reservoir /Yampa ***River***, ***Colorado*** Water Trust (2016) [*http://www.coloradowatertrust.org/programs/projects/stagecoach-reservoir-yampa-****river***](http://www.coloradowatertrust.org/programs/projects/stagecoach-reservoir-yampa-river) (last visited April 4, 2017). [↑](#footnote-ref-89)
89. 89 [***Colo.*** *Rev. Stat. § 37-92-103(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016); A conditional water right is defined as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." Id. In City of Thornton v. Bijou Irrigation Company, the ***Colorado*** Supreme explained that

    to establish a conditional water right, an applicant must show in general that a "first step' toward the appropriation of a certain amount of water has been taken, that the applicant's intent to appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is a substantial probability that the applicant can and will complete the appropriation with diligence.

    [*926 P.2d 1, 31 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-90)
90. 90 Findings of Fact, Conclusions of Law, Judgment and Decree, Case No. 92CW107 at 2 (***Colo.*** Water Ct. Div. No. 4). [↑](#footnote-ref-91)
91. 91 S.B. 94-54, 59th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 1994). [↑](#footnote-ref-92)
92. 92 H.B. 00-1438, 62d Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2000). [↑](#footnote-ref-93)
93. 93 S.B. 84-161, 54th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 1984); H.B. 91-1110, 58th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 1991); H.B. 93-1158, 59th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 1993); S.B. 13-19, 69th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2013); S.B. 14-23, 69th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2014); H.B. 15-1222, 70th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2015). [↑](#footnote-ref-94)
94. 94 Mark Squillace and Anthony McLeod, in their article Marketing Conserved Water, define conserved water as "water that was previously consumed but that is no longer consumed in the agricultural enterprise", and then say that methods which can save this water, including deficit irrigation, crop-switching, and rotational fallowing, "cannot legally be transferred or sold to urban, industrial, or any other potential users" in ***Colorado***. Mark Squillace & Anthony McLeod, Marketing Conserved Water, [*46 Envt'l. L. 1, 4 (2016).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5JS1-YFF0-00CW-B0PD-00000-00&context=1516831) This is not true. The McKinley Ditch and the Coats Bros Ditch transfers to the Instream Flow Program do just that with deficit irrigation. See ***Colo.*** Water Conservation Bd., McKinley Ditch - Little Cimarron ***River***, ***Colo.*** Dept. of Nat. Res., [*http://cwcb.state.****co****.us/environment/instream-flow-program/Pages/McKinleyDitch*](http://cwcb.state.co.us/environment/instream-flow-program/Pages/McKinleyDitch) ACQ.aspx (last visited April 4, 2017); Lease of Water Rights from the Coats Bros Ditch, ***Colo.*** Dept. of Nat. Res., [*http://cwcbweblink.state.****co****.us/weblink/0/doc/195219/Electronic.aspx*](http://cwcbweblink.state.co.us/weblink/0/doc/195219/Electronic.aspx)? searchid=70465416-38a6-41df-bc2b-7e60575cf175 (last visited April 4, 2017). Additionally, rotational fallowing with subsequent transfer is occurring in the Arkansas Basin. ***Colo.*** Water Conservation Bd., Criteria and Guidelines for Fallowing-Leasing Pilot Projects, ***Colo.*** Dept. of Nat. Res., [*http://cwcb.state.****co****.us/water-management/water-projects-programs/Pages/*](http://cwcb.state.co.us/water-management/water-projects-programs/Pages/) Fallowing-LeasingPilotProjects.aspx (last visited April 4, 2017). [↑](#footnote-ref-95)
95. 95 See S.B. 84-161, supra note 57. [↑](#footnote-ref-96)
96. 96 Lynn Bartels, Gov. Hickenlooper hammered over veto of water-efficiency measure, Denv. Post (Jun. 10, 2014). [↑](#footnote-ref-97)
97. 97 S.B. 02-156, 63d Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2002) (Introduced Bill). [↑](#footnote-ref-98)
98. 98 Id. [↑](#footnote-ref-99)
99. 99 See [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-100)
100. 100 S.B. 73-97, supra note 4. [↑](#footnote-ref-101)
101. 101 Id. The section remains basically the same today. See [***Colo.*** *Rev. Stat. § 37-92-103(4)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). [↑](#footnote-ref-102)
102. 102 Joshua Zaffos, CWCB's Instream Flow Program matures, ***Colo.*** Foundation Water Education, [*https://www.yourwatercolorado.org/cfwe-education/water-is/water-law/*](https://www.yourwatercolorado.org/cfwe-education/water-is/water-law/) 100-headwaters-magazine/headwaters-fall-2009-the-cwcb/343-cwcbs-instream-flow-program-matures. [↑](#footnote-ref-103)
103. 103 S.B. 87-212, supra note 46. [↑](#footnote-ref-104)
104. 104 S.B. 02-156, supra note 96. [↑](#footnote-ref-105)
105. 105 Agreement between ***Colo.*** Water Conservation Bd. And the San Juan Resource Conservation and Dev. Council (Jan. 19, 2007), [*http://cwcbweblink.state.****co****.us/weblink/0/doc/104642/*](http://cwcbweblink.state.co.us/weblink/0/doc/104642/) Page1.aspx?searchid=b634cf6b-d7c5-419e-a477-ee395a365019. [↑](#footnote-ref-106)
106. 106 ***Colo.*** Found. for Water Educ. staff, Instream Flows, Improving and Protecting our Streams and Lakes, Headwaters 11 (Spring 2004). [↑](#footnote-ref-107)
107. 107 Memorandum from Dan Merriman & Anne Janicki to ***Colo.*** Water Conservation Bd. (Jan. 8, 2003). [↑](#footnote-ref-108)
108. 108 Id. [↑](#footnote-ref-109)
109. 109 The CWCB is required to do a stacking analysis under Rule 6c. [*2* ***Colo.*** *Code Regs. § 408-2(6c)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831). [↑](#footnote-ref-110)
110. 110 H.B. 08-1280, 66th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2008) (codified in [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016)). This statutory change immediately resulted in an acquisition for the Instream Flow Program. Declaration of a Revocable Trust: The Pitkin County Water Rights Revocable Trust, ***Colorado*** Water Conservation Board (December 23, 2009), [*http://cwcbweblink.state.****co****.us/weblink/0/doc/151124/*](http://cwcbweblink.state.co.us/weblink/0/doc/151124/) Electronic.aspx?searchid=2e830e61-2d5d-4af9-9a5f-0c7cd0f2c68a (last visited May 1, 2017). [↑](#footnote-ref-111)
111. 111 [***Colo.*** *Rev. Stat. § 37-83-105(2)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2016). [↑](#footnote-ref-112)
112. 112 [*ISG, LLC v. Arkansas Valley Ditch Ass'n, 120 P.3d 724, 734 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H5W-T3J0-0039-4284-00000-00&context=1516831) [↑](#footnote-ref-113)
113. 113 H.B. 08-1280, supra note 109 (codified in ***Colo.*** Rev. Stat. § 37-92-10(2)(b)(VI)(2016)). [↑](#footnote-ref-114)
114. 114 Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to [***Colo.*** *Rev. Stat. § 37-60-123.7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J335-00000-00&context=1516831) (2016). [↑](#footnote-ref-115)
115. 115 Completed Transactions, ***Colorado*** Water Conservation Board, [*http://cwcb.state.****co****.us/environment/instream-flow-program/Pages/*](http://cwcb.state.co.us/environment/instream-flow-program/Pages/) CompletedTransactions.aspx (last visited April 21, 2017). It is difficult to quantify cfs and acre-feet resulting from acquisitions due to seasonal flows and many other variables. These numbers result from averages. [↑](#footnote-ref-116)
116. 116 [*Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc, 386 P.3d 452, 463 (****Colo.*** *2016).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MB2-RH51-F04C-3025-00000-00&context=1516831) [↑](#footnote-ref-117)
117. 117 Id. [↑](#footnote-ref-118)
118. 118 See Resume Notification for 05CW265, Division 5 Water Resume (Dec. 2005) [*https://www.courts.state.****co****.us/Courts/Water/Resumes/Div5/12\_*](https://www.courts.state.co.us/Courts/Water/Resumes/Div5/12_) 2005.pdf (last visited May 1, 2017); Municipalities take a similar approach; many municipal change decrees allow for a municipality to call for historical diversion amounts to their intakes and replace return flows when a senior call is on. Chapter 6: Water Supply Management, ***Colorado***'s Water Plan 2015, 6-77 to 6-82, [*https://www.****colorado****.gov/pacific/sites/default/files/CWP2016.pdf*](https://www.colorado.gov/pacific/sites/default/files/CWP2016.pdf). [↑](#footnote-ref-119)
119. 119 A change of water right "shall be approved if such change … will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." [***Colo.*** *Rev. Stat. § 37-92-305(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2016). [↑](#footnote-ref-120)
120. 120 Ditch losses may reduce this diversion number. [↑](#footnote-ref-121)
121. 121 See e.g., Decree, Case No. 05CW264, 6, (***Colo.*** Water Ct. Div. No. 5, Apr. 14, 2011). [↑](#footnote-ref-122)
122. 122 See e.g., [*City of Thornton v. Bijou Irr.* ***Co****., 926 P.2d 1, 87 (****Colo.*** *1996).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-123)
123. 123 ***Colorado***'s Water Plan, supra note 116, at 6-93 to 6-126. [↑](#footnote-ref-124)
124. 124 Findings of Fact, Conclusions of Law, Ruling of the Referee, and Decree of the Water Court, Case No. 14CW3108, 6-9 (***Colo.*** Water Ct. Div. No. 4, Nov. 18, 2016). [↑](#footnote-ref-125)
125. 125 Id. at 6. [↑](#footnote-ref-126)
126. 126 See id. at 6-9. [↑](#footnote-ref-127)
127. 127 Squillace & McLeod, supra note 93, Lease of Water Rights from the Coats Bros Ditch, ***Colo.*** Dept. of Nat. Res., 7, [*http://cwcbweblink.state.****co****.us/weblink/0/doc/195219/*](http://cwcbweblink.state.co.us/weblink/0/doc/195219/) Electronic.aspx?searchid=70465416-38a6-41df-bc2b-7e60575cf175 (last visited April 12, 2017). [↑](#footnote-ref-128)
128. 128 Peter Leigh Taylor & Kelsea MacIlroy, Uncovering Barriers and Disincentives, as well as Opportunities for Effective Conservation, ***Colo.*** Water, Nov.-Dec. 2015, at 8, [*http://wsnet.colostate.edu/cwis31/ColoradoWater/Images/Newsletters/*](http://wsnet.colostate.edu/cwis31/ColoradoWater/Images/Newsletters/) 2015/CW\_32\_4.pdf (last accessed May 1, 2017). [↑](#footnote-ref-129)
129. 129 H.B. 03-1320, 61st Gen. Assemb., Reg. Sess (***Colo.*** 2003) (codified at [***Colo.*** *Rev. Stat. § 37-83-105(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)). [↑](#footnote-ref-130)
130. 130 H.B. 05-1039, 63rd Gen. Assemb., Reg. Sess. (***Colo.*** 2005). [↑](#footnote-ref-131)
131. 131 [***Colo.*** *Rev. Stat. § 37-83-105(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2016). [↑](#footnote-ref-132)
132. 132 Id. § 37-83-105(1). [↑](#footnote-ref-133)
133. 133 Id. § 37-83-105(2)(a)(IV). [↑](#footnote-ref-134)
134. 134 Id. [↑](#footnote-ref-135)
135. 135 Id. § 37-83-105(2)(a); [*2* ***Colo.*** *Code Regs. § 408-2(6)(k)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831) (2016). [↑](#footnote-ref-136)
136. 136 See, e.g., [***Colo.*** *Rev. Stat. § 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831). [↑](#footnote-ref-137)
137. 137 See, e.g., id. [↑](#footnote-ref-138)
138. 138 Bruce Finley, ***Colorado*** ***rivers***, streams may get boost from lease of water rights, Denv. Post, April 25, 2012, [*http://www.denverpost.com/2012/04/25/****colorado****-****rivers****-streams-may-get-boost-from-lease-of-water-rights/*](http://www.denverpost.com/2012/04/25/colorado-rivers-streams-may-get-boost-from-lease-of-water-rights/) (last visited May 1, 2017). [↑](#footnote-ref-139)
139. 139 Id. [↑](#footnote-ref-140)
140. 140 The attrition rate was high, as these numbers suggest. One reason for that is that we asked people who were willing to submit their water rights to our confidential review not to self select. As long as they fell into one of our priority basins, we encouraged people to offer water and let the Water Trust and CWCB determine whether the water could be useful. Another reason for a high attrition rate was that many offers had too little historical use, or were of too junior a priority. [↑](#footnote-ref-141)
141. 141 See generally [*Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1149-50 (****Colo.*** *2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44PW-3160-0039-4363-00000-00&context=1516831) [↑](#footnote-ref-142)
142. 142 Id. [↑](#footnote-ref-143)
143. 143 Id. [↑](#footnote-ref-144)
144. 144 [***Colo.*** *Rev. Stat. § 37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). [↑](#footnote-ref-145)
145. 145 [***Colo.*** *Rev. Stat. § 37-92-305(8)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2016). [↑](#footnote-ref-146)
146. 146 Findings of Fact, Conclusions of Law, and Decree of the Water Court at 16.3, In re Ogilvy Augmentation ***Co***., No. 03CW150 (***Colo.*** Water Ct. Div. No. 1 July 25, 2013). [↑](#footnote-ref-147)
147. 147 S.B. 86-91, 55th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 1986) (enacted). [↑](#footnote-ref-148)
148. 148 Poudre Runs Through It Study/Action Work Grp., Improving Flows While Respecting Water Rights, [*http://prti.colostate.edu/Flows.shtml*](http://prti.colostate.edu/Flows.shtml). [↑](#footnote-ref-149)
149. 149 Kerry Sundeen, et al., 10825 Water Supply Alternatives Summary: Phase 2 Assessment at 1 (Jan. 2008 draft), [*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&*](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&) source=web&cd=3&ved=0ahUKEwjUu4bMqd7SAhWZ0YMKHRnTCmgQFggmMAI& url=http%3A%2F%2Fwww.fws.gov%2FRegion6Test%2Fdocuments-publications%2F technical-reports%2Fisf%2F10825SumJan08.pdf&usg=AFQjCNFIssud83sS4Y YeeYWeS9DZNYCBWg&bvm=bv.149760088,d.amc (***Colorado*** ***River*** water users provide water to the upper ***Colorado*** ***River*** Endangered Fish Recovery Program). [↑](#footnote-ref-150)
150. 150 ***Colorado*** Division of Wildlife, Voluntary Flow Program in Full Swing on the Arkansas ***River*** (July 13, 2013), [*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&*](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&) source=web&cd=11&ved=0ahUKEwjyvfX9qd7SAhXo24MKHcvODeM4ChAWCBkwAA& url=https%3A%2F%2Fcoyotegulch.blog%2F2013%2F07%2F13%2Fvoluntary-flow-program-in-full-swing-on-the-arkansas-***river***%2F&usg=AFQjCNG5Tz410zR2BAooan2gf PYU3OXXSA&bvm=bv.149760088,d.amc (Arkansas ***River*** water users have come together to time releases from upstream reservoirs to benefit the rafting industry and to protect fish). [↑](#footnote-ref-151)
151. 151 ***Colorado*** Parks and Wildlife, Rio Grande Cooperation Aids Irrigation and Wildlife (Nov. 26, 2012), [*http://cpw.state.****co****.us/aboutus/Pages/News-Release-Details.aspx?NewsID=3912*](http://cpw.state.co.us/aboutus/Pages/News-Release-Details.aspx?NewsID=3912) (Reservoir owners are looking at alternative release schedules to support fish in downstream stretches of ***river***). [↑](#footnote-ref-152)
152. 152 S.B. 13-19, 69th Gen. Assemb., Reg. Sess. (***Colo.*** 2013) (enacted). [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 The original geographic limitation was lifted by HB 17-1233. See H.B. 17-1233, 71st Gen. Assemb., Reg. Sess. (***Colo.*** 2017). [↑](#footnote-ref-155)
155. 155 See id. [↑](#footnote-ref-156)
156. 156 See id. [↑](#footnote-ref-157)
157. 157 [***Colo.*** *Rev. Stat. § 37-92-305(3)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2016) (S.B. 13-019 couples with S.B. 05-133, codified at [***Colo.*** *Rev. Stat. § 37-92-103(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) to protect the water user from abandonment as well). [↑](#footnote-ref-158)
158. 158 ***Colorado*** Water Trust, Rio ***Colorado*** / Willow Creek, [*http://www.coloradowatertrust.org/programs/projects/rio-****colorado****-willow-creek/*](http://www.coloradowatertrust.org/programs/projects/rio-colorado-willow-creek/). [↑](#footnote-ref-159)
159. 159 Id. [↑](#footnote-ref-160)
160. 160 Bureau of Reclamation, Pilot System Conservation Program (Pilot Program) (Dec. 2, 2016), [*https://www.usbr.gov/lc/region/programs/PilotSysConsProg/pilotsystem.html*](https://www.usbr.gov/lc/region/programs/PilotSysConsProg/pilotsystem.html). [↑](#footnote-ref-161)
161. 161 Stagecoach Reservoir / Yampa ***River***, ***Colo.*** Water Trust, [*http://www.coloradowatertrust.org/programs/projects/stagecoach-reservoir-yampa-****river***](http://www.coloradowatertrust.org/programs/projects/stagecoach-reservoir-yampa-river); Findings of Fact, Judgment and Decree of the Water Court, In re: The ***Colorado*** Water Conservation Board ex rel., No. 01CW106 (***Colo.*** Water Ct. Div. No. 6 2003). [↑](#footnote-ref-162)
162. 162 Mike Neumann & Chris Wilson, Yampa ***River*** Management Plan IV-6 (2003) (The City has embarked on a stream management planning process to bring more science, clarity, and stakeholder buy-in to determining desired flow rates through the City). [↑](#footnote-ref-163)
163. 163 ***Colorado*** Foundation for Water Education, Power in the Marketplace, Headwaters, Fall 2013 [*https://www.yourwatercolorado.org/headwaters-archive-blank/*](https://www.yourwatercolorado.org/headwaters-archive-blank/) 287-headwaters-magazine/fall-2013-the-energy-issue/626-power-in-the-marketplace. [↑](#footnote-ref-164)
164. 164 Id. [↑](#footnote-ref-165)
165. 165 [***Colo.*** *Rev. Stat. § 37-83-105(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2016). [↑](#footnote-ref-166)
166. 166 H.B. 03-1320, supra note 127. [↑](#footnote-ref-167)
167. 167 Tom Ross, ***Colorado*** Water Trust Praises Local Agencies for Leadership, Buys Water to Boost Yampa ***River***, Steamboat Today (Sep. 23, 2016), [*http://www.steamboattoday.com/news/2016/sep/23/****colorado****-water-trust-praises-local-agencies-leader/*](http://www.steamboattoday.com/news/2016/sep/23/colorado-water-trust-praises-local-agencies-leader/). [↑](#footnote-ref-168)
168. 168 S.B. 13-19, supra note 150 (Hearings Before the S. Comm. on Agriculture, Natural Resources, & Energy (2013) (testimony of Kristin Moseley). [↑](#footnote-ref-169)
169. 169 Letter from Linda J. Bassi to ***Colo.*** Water Conservation Bd. (Sept. 1, 2011), [*http://cwcbweblink.state.****co****.us/WebLink/ElectronicFile.aspx?docid=154553&*](http://cwcbweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=154553&) searchid=c29a9723-911c-4624-901c-95c3e981747f&dbid=0. [↑](#footnote-ref-170)
170. 170 Agreement between ***Colo.*** Water Conservation Bd. and City & Cty of Denver (Feb. 15, 2013), [*http://cwcbweblink.state.****co****.us/weblink/0/doc/191578/*](http://cwcbweblink.state.co.us/weblink/0/doc/191578/) Electronic.aspx?searchid=4297794d-be87-4deb-889c-cfac8b680f31. [↑](#footnote-ref-171)