

# [***ARTICLE: Instream Flows, Recreation as Beneficial Use, and the Public Interest in Colorado Water Law***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4H22-6RG0-00SW-509K-00000-00&context=1516831)

Spring, 2005

**Reporter**

8 U. Denv. Water L. Rev. 517 \*

**Length:** 15209 words

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**Text**

**[\*517]**

I. Introduction

***Colorado*** is the leading prior appropriation state of the American West. In contrast to the riparian states of the East and the hybrid prior appropriation states of the West, ***Colorado*** remains loyal in its adherence to a common-law doctrine of water rights that emerged from the mining and irrigation practices in place at the time of statehood. [[1]](#footnote-2)1 However, as the population and economy of the West becomes increasingly urbanized and less agricultural, [[2]](#footnote-3)2 effective management of water rights will test ***Colorado*** water law. In particular, the growth of gateway communities in the ***Colorado*** Rocky Mountains -- and their increasing **[\*518]** economic and political clout [[3]](#footnote-4)3 -- could pose challenges to the state's pronounced rejection of the public trust doctrine. [[4]](#footnote-5)4 The recent decision of the ***Colorado*** Supreme Court to affirm water court decisions granting instream flows to the cities of Golden, Breckenridge, and Vail, and the legislative acknowledgment of local government influence on water development, foreshadow this proposition. [[5]](#footnote-6)5

The Importance of Gateway Communities in ***Colorado***

The Western economy grew from intensive farming and natural resource development. But times have changed significantly, bringing a new economic era featuring a new service sector dominated by professionals and accompanying support jobs that no longer rely on raw resource development. [[6]](#footnote-7)6 Historically, access to repositories of raw materials provided the economic benefit to Western rural communities, especially. [[7]](#footnote-8)7 But as the new service sector grows, gateway communities are finding economic benefits from marketing their natural landscape and outdoor amenities in the growing recreation and tourism industry. [[8]](#footnote-9)8 For example, when nearly one third of the economic base of Kremmling, ***Colorado***, was impacted by the permanent closing of the Louisiana Pacific wafer board plant in 1991, the tiny community of about 1,200 residents responded by drafting an economic development **[\*519]** plan marketing its environmental quality, including the designation of the nearby upper ***Colorado*** ***River*** as a scenic byway. [[9]](#footnote-10)9

Vail, ***Colorado*** is the prime example of a burgeoning gateway community that developed around a modern recreation based economy. Unlike surrounding revival towns like Aspen that started as mining settlements, Vail was born a small ski resort. [[10]](#footnote-11)10 But like many of the surrounding mountain communities in the later half of the twentieth century, the resort-turned-town [[11]](#footnote-12)11 marketed its unique location and natural amenities and quickly became a resort phenomenon, [[12]](#footnote-13)12 sporting luxurious spas and resorts, fabulous ski facilities, and decadent housing [[13]](#footnote-14)13 for its wealthy visitors. But for its location in the high peaks of the ***Colorado*** Rockies, it is doubtful the town would have achieved such wealth. Vail and other gateway communities to the Rockies are examples of communities finding economic wealth in the quality of the natural environment and the non-consumptive use of natural resources, both considered essential in retaining existing businesses and attracting new ones. [[14]](#footnote-15)14

More recently, mountain municipalities have emphasized other forms of outdoor adventure and recreation as part of the repertoire of available activities that help sustain the local economy year-round. [[15]](#footnote-16)15 The latest trend across ***Colorado*** has been to host the whitewater sports of boating and kayaking, [[16]](#footnote-17)16 which depend, of course, on water supply and the right to use it. **[\*520]**

II. Water Rights for Recreation

The natural resources of the Rockies largely caused the success [[17]](#footnote-18)17 of ***Colorado***'s gateway communities -- first because of extraction of these resources and now the recreational uses of these resources. As a result, these places face conflicting goals of promoting the resort, recreation, and service industries that give economic life to the communities while preserving the quality of the natural environment that makes the experience of these places so appealing. [[18]](#footnote-19)18 What this means for ***Colorado*** water law is that private industry could actually fuel a "quasi-environmental" or "quasi-public interest" argument in the courts and legislature. This clearly makes for strange bedfellows in terms of the constituencies that hold stakes in the future of ***Colorado*** water law, because rights in water are decided not by whose interests may override others on the basis of policy, but by the historical doctrine of prior appropriation. Further, what the ***Colorado*** public, environmentalists, and private industry believe should be "priorities" in policy terms does not necessarily translate into "priority" in legal terms.

The Changing Doctrine

***Colorado*** expressly adopted the doctrine of prior appropriation in its state constitution, [[19]](#footnote-20)19 as interpreted in subsequent judicial decisions [[20]](#footnote-21)20 and in legislation. [[21]](#footnote-22)21 The creation of a water right in ***Colorado*** is accomplished by fulfillment of three elements: 1) intent to use the water; **[\*521]** 2) diversion of the water; and 3) application of the diverted water to a beneficial use. [[22]](#footnote-23)22

"Diversion" remains an evolving concept. Usually meaning a direct physical taking of water from a natural source, a diversion does not necessarily mean removal of the water, as in the case of instream flows. [[23]](#footnote-24)23 The codified definition of "diversion" includes either removal of water from a natural source or "controlling water in its natural course...." [[24]](#footnote-25)24 Though this conceptualization of diversion might seem discordant to the traditional concept of "appropriation," ***Colorado*** has clarified the definition of appropriation to mean "application of a specified portion of the waters...to a beneficial use...." [[25]](#footnote-26)25

For the purpose of environmental conservation, the ***Colorado*** legislature has also provided for the appropriation of minimum stream flows by the ***Colorado*** Water Conservation Board (CWCB). [[26]](#footnote-27)26 The ***Colorado*** Supreme Court in ***Colorado*** ***River*** Water Conservation District v. ***Colorado*** Water Conservation Board examined this provision challenged as a failure to divert under the state constitution. [[27]](#footnote-28)27 The court upheld the minimum flow statute, concluding that the constitutional language preserving the right to divert water to beneficial use was not intended to establish a requirement that appropriation be based on diversion. [[28]](#footnote-29)28 **[\*522]**

Instream Flows and Recreation as Beneficial Use

Beneficial use of water is the most fundamental diversion requirement. [[29]](#footnote-30)29 The rationale for the beneficial use element was to avoid speculation and to encourage rapid use of water. [[30]](#footnote-31)30 But what constitutes beneficial use has been the subject of much debate, especially as patterns of use have changed over the last century with the decline of agriculture. Before the adoption of the Water Right Determination Act of 1969, [[31]](#footnote-32)31 courts determined the relative priority among uses of water in times of shortage by reference to the state constitution. The constitution recognizes a domestic preference over those claims for any other purpose, and those using water for agricultural purpose have a preference over manufacturing purposes. [[32]](#footnote-33)32 The ***Colorado*** Supreme Court did not interpret this list as exhaustive holding in City and County of Denver v. Sheriff that the municipal use of water for irrigation was a constitutional beneficial use. [[33]](#footnote-34)33 The court reasoned that the determination of what qualifies as beneficial use is a question of fact that depends on the circumstances of the case. [[34]](#footnote-35)34 In general, the common law interpretation of beneficial use under the prior appropriation doctrine compares wastefulness of a specific use of water to other possible uses and to alternative means of achieving the purpose for that particular use. [[35]](#footnote-36)35

The Water Right and Determination Act expanded the range of beneficial uses by explicitly stating that impoundment for recreation (i.e. fishing and wildlife) is a beneficial use. [[36]](#footnote-37)36 The Act also includes a beneficial use for appropriation by the state for maintenance of minimum flows necessary for the reasonable preservation of the natural environment. [[37]](#footnote-38)37 Thus, maintaining instream flow became a viable form of appropriation to establish a water right.

Before the 2001 amendments to the Act, FN 38 38 the court determined which entities other than the CWCB could appropriate instream flows. In City of Thornton v. City of Fort Collins, Fort Collins filed an application for the appropriation of instream flows on a stretch of the Poudre **[\*523]** ***River*** running through the city. [[38]](#footnote-39)38 Thornton argued that the Act only authorized the CWCB to appropriate instream flows. [[39]](#footnote-40)39 Fort Collins responded by amending its application. [[40]](#footnote-41)40 The city characterized two dam structures as diversions put to beneficial use: the Nature Dam, built to return the stream to its historic channel from a flood channel; and the Power Dam, built upstream to support a fish ladder and boat chute designed for recreational and piscatorial purposes. [[41]](#footnote-42)41 Though the water court approved the Nature Dam, it denied the Power Dam appropriation, claiming the structure did not amount to a diversion, but a minimum stream flow appropriation. [[42]](#footnote-43)42 The ***Colorado*** Supreme Court on appeal affirmed the Nature Dam appropriation but also held the Power Dam to be a valid diversion. [[43]](#footnote-44)43 Citing the statutory definition of a diversion, the court held that the conventional sense of removing water from its natural course was no longer the legal requirement for diversion. [[44]](#footnote-45)44 The court also declared that a valid appropriation may result from controlling the flow of water by means of a device or structure employed for beneficial use. [[45]](#footnote-46)45

Another decision by the state supreme court in 1992 upheld a decree granting a right to the Upper Gunnison ***River*** Water Conservancy District to refill the Taylor Park Reservoir in order to maintain fishery conditions. [[46]](#footnote-47)46 The court held that the Reservoir was a structure that effectuated beneficial use of captured water for purposes of recreation. [[47]](#footnote-48)47

The series of statutory amendments to instream flow legislation culminated in 2001, when the ***Colorado*** General Assembly established procedures for local governments to make appropriations for recreational in-channel diversions. [[48]](#footnote-49)48 Specifically, the legislation amended the definition of beneficial use to include diversion "by a county, municipality, city and county, water district, water and sanitation district, water **[\*524]** conservation district, or water conservancy district for recreational in-channel diversion purposes." [[49]](#footnote-50)49 Prior to the amendment, the statute had indicated only fishery or wildlife as recreational purposes qualifying as beneficial uses. [[50]](#footnote-51)50 The legislature also changed the definition of diversion to state, "only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may control water in its natural course or location for recreational in-channel diversions." [[51]](#footnote-52)51 Previously, the statute had indicated only the CWCB could hold minimum flow rights. [[52]](#footnote-53)52 A new statutory subsection was also added to define RICD as "the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures pursuant to an application filed by a [local government entity] for a reasonable recreation experience in and on the water." [[53]](#footnote-54)53

Though these new provisions have yet to be directly tested in the courts, the recent case involving City of Golden's application for instream flow rights for a kayaking course suggests these amendments are viable changes the state's prior appropriation doctrine. [[54]](#footnote-55)54 Specifically, the ***Colorado*** Supreme Court let stand the decision of the water court holding that the appropriation of instream flows for recreational purposes satisfies the beneficial use requirement under the ***Colorado*** Constitution. [[55]](#footnote-56)55

The Case of Golden

In June of 2001, the Water Court issued a decree granting instream flow rights to the City of Golden, ***Colorado***, against objections of the CWCB [[56]](#footnote-57)56 and the State Engineer. [[57]](#footnote-58)57 The water court granted a flow rate **[\*525]** of 1,000 cfs to Golden for use in seven dams and deflector devices constructed on Clear Creek to form the Golden White-Water Course. [[58]](#footnote-59)58 The Course design allows for the control and concentration of flow within the creek that sustains use of boating chutes throughout the year. [[59]](#footnote-60)59 The city sought and the water court granted absolute water rights [[60]](#footnote-61)60 for the existing dams and deflectors, plus conditional rights to maintain optimum flow during May and July. [[61]](#footnote-62)61

In accordance with City of Thornton, [[62]](#footnote-63)62 the court determined that Golden made an appropriate diversion of the water by means of controlling the natural flow using the dams and deflectors. [[63]](#footnote-64)63 The court affirmed that recreation for boating is a beneficial use of the water, and stated, "City of Golden derives substantial economic benefit from the recreational use of the Course. This benefit has been an important factor in the economic redevelopment of the Golden downtown area." [[64]](#footnote-65)64 The court also pointed out that the question of reasonableness of the amount of water appropriated was not whether the amount is reasonable in the abstract, but whether the quantity was "reasonable **[\*526]** for the purposes for which Golden made the appropriation." [[65]](#footnote-66)65 In considering the reasonableness of the amount of water claimed, the court stated "although not required to consider other potential uses of water in quantifying a water right under the beneficial use statute, the Court notes that the rights at issue are non-consumptive, and the water claimed is always available for all downstream uses." [[66]](#footnote-67)66 Weighing the economically important recreational purposes of the whitewater course against the subordination of Golden's rights to senior users downstream [[67]](#footnote-68)67 and the city's stipulations to upstream users, [[68]](#footnote-69)68 the water court found the instream appropriations were reasonable within the statutory requirements for beneficial use. [[69]](#footnote-70)69 The water court concluded

Golden's constitutional right to appropriate a new water right in accordance with ***Colorado*** law may not be denied or limited based upon the public trust doctrine, or similar policy restraints purportedly rooted in concern for the quantities that should be left for future water users. "A public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy." [[70]](#footnote-71)70

III. Limits on Instream Flow Appropriations

The decision of the ***Colorado*** Supreme Court is less a monumental ruling than a procedural checkpoint in the tale of three cities. Since the court issued no opinion, the "ruling" is not really a holding on the merits of the case. [[71]](#footnote-72)71 This means that the ruling does not set any precedent and applies only to Golden, Breckenridge, and Vail. [[72]](#footnote-73)72 This leaves for another day the interpretation of new statutory provisions governing **[\*527]** the adjudication of instream flow applications by local government entities. [[73]](#footnote-74)73

From a policy standpoint, however, many observers interpreted the supreme court decision as a historic change in state water law, effectively placing the recreational uses of water for kayaking and fishing in equal standing with consumptive uses for farming, industry, and development. [[74]](#footnote-75)74 However, closer examination of the amended state laws governing instream appropriations by local entities suggests that procedures empowering the CWCB to impose limits on flow amounts are likely to encumber the ability of local governments to exploit RICDs.

A reading of the amended statutes reveals that, while enabling local governments to seek RICDs, the ***Colorado*** General Assembly at the same time boosted the influence of the CWCB by adding procedures for the adjudication of instream flow rights. Specifically, any local government entity [[75]](#footnote-76)75 seeking adjudication of an RICD [[76]](#footnote-77)76 must submit a copy of its application to the CWCB, who "shall make findings of fact and a final recommendation as to whether the application should be granted, granted with conditions, or denied." [[77]](#footnote-78)77 The factors under which the CWCB must make findings include:

(I) Whether the adjudication and administration of the RICD would impair the ability of ***Colorado*** to fully develop and place to consumptive beneficial use its compact entitlements;

(II) The appropriate reach of stream required for the intended use;

(III) Whether there is access for recreational in-channel use;

**[\*528]**

(IV) Whether exercise of the RICD would cause material injury to instream flow water rights appropriated pursuant to subsections (3) and (4) of this section;

(V) Whether adjudication and administration of the RICD would promote maximum utilization of waters of the state as referenced in paragraph (a) of subsection (1) of this section; and

(VI) Such other factors as may be determined appropriate for evaluation of RICDs and set forth in rules adopted by the board, after public notice and comment. [[78]](#footnote-79)78

Factor I specifically addresses an objection raised by the CWCB in the Golden case. [[79]](#footnote-80)79 However, the water court concluded in Golden that the instream flow rights sought by the city would not have the effect of exporting water outside of the state, because the flows sought lay upstream from various customary diversions in-state. [[80]](#footnote-81)80 At the trial, the state even conceded the water rights granted to Golden would have no adverse impact on the state's compact entitlement at issue. [[81]](#footnote-82)81

Minimum Flow as a Limitation

***Colorado*** state courts could interpret the new designation of the RICD as the exclusive means by which local governments may acquire instream flow rights. The statutory language implies this result by exclusively authorizing the CWCB to appropriate instream flows for conservation. [[82]](#footnote-83)82 Additionally, the statutes limit the allowable amount of water flow in the definition of RICD to the minimum flow required for a reasonable recreational experience in or on the water. [[83]](#footnote-84)83 A plain reading of this definition suggests that the CWCB could attempt to significantly restrict the amount of flow to a level substantially lower than the more desirable seasonal high water mark most towns would seek. In fact, in its first exercise under the new laws, the CWCB recommended 250 cfs of flow for the application by the Upper Gunnison ***River*** Water Conservancy District that requested a range of flows from 270 cfs in September **[\*529]** to 1,190 cfs in May for a boating course in Gunnison. [[84]](#footnote-85)84 According to the District's manager, the amount recommended by the CWCB is "barely floatable," and that the peak amount requested by the District falls well below the present flow of the ***river*** at 3,000 cfs. [[85]](#footnote-86)85

Judging from the disparity between the CWCB recommendations and the flow amounts requested by the Gunnison District, local entities might find it difficult to anticipate what the CWCB might consider the minimum flow necessary for a reasonable recreational experience. The CWCB itself is fully aware of the looming debate over what the appropriate amount of flow is for RICDs. In a CWCB meeting specifically on the issue of RICDs, and before the ***Colorado*** legislature even codified the definition of RICD, the CWCB questioned whether the amount of flow should be the maximum amount necessary to achieve the most desirable boating flows, or the minimum amount needed for just boat passage, or the amount necessary to accommodate world-class water sports. [[86]](#footnote-87)86 While is no legislative mandate for the water court to adopt CWCB's findings, the law does state that "the water court shall apply the factors [considered by the CWCB] and that "all findings of fact contained in the recommendation of the CWCB shall be presumptive as to such facts, subject to rebuttal by any party." [[87]](#footnote-88)87 Clearly, the burden lies with the Gunnison District to persuade the water court that a reasonable recreational experience on its watercourse requires higher levels than the minimum flow suggested by CWCB. **[\*530]**

It remains to be seen how local governments will characterize the recreational purposes in order to "maximize the minimum" flow. That is, anticipating that the CWCB will recommend lower than desirable levels, a town could potentially over-appropriate in an attempt to claim maximum flows for conditional rights, and during the diligence period hope to establish the actual flow rate necessary to justify absolute rights. Glenn Porzak, who represented Golden in its request for instream flow rights, has put his faith in the water court [[88]](#footnote-89)88 and has dismissed the minimum flow limitation, stating "people don't come to ***Colorado*** to enjoy our 'minimum' amount of beauty, to climb our 'minimal'-sized mountains or to have a 'minimal' recreation experience." [[89]](#footnote-90)89 It could therefore become vital for local governments that the state courts interpret the new RICD as an instream flow right measured by different standards than the minimum flows appropriated for conservation purposes by the CWCB. A differentiation from the minimum flows necessary for conservation clearly would benefit local governments seeking flows that will maximize recreational experiences. Therefore, much debate in ***Colorado*** courts will likely be over the legislative intent of defining RICDs for local governments separately from the minimum flows the CWCB may appropriate. One could infer from the statutory distinction that indeed more than the minimum flow for conservation may be necessary for a reasonable recreational experience. Perhaps this distinction is also an attempt to avoid lumping other instream uses of water under the CWCB, which may give the impression that the CWCB in fact represents the public interest. The distinction generally seems to hinge on the fact that unlike the CWCB, whose purpose is really serving the public by taking conservation measures, local governments are not serving the public interest per se, but instead facilitate private enterprise in the form of attracting tourism and sporting events. **[\*531]**

Reasonableness of the Recreational Experience

In Golden, the water court stated, "water rights in ***Colorado*** are quantified according to the amount of water that is reasonable to serve the appropriator's intended beneficial use." [[90]](#footnote-91)90 The new definition of the RICD states that the measure of the water right is the minimum flow necessary for reasonable recreation. [[91]](#footnote-92)91 Apparently, then, the reasonable amount of water for recreational use according to the CWCB is the minimum flow necessary for that use. This implies that the measure of the water right ultimately may depend on the type of recreational activities for which the instream flows are sought. For example, world-class kayaking obviously requires significantly more water flow than fishing.

Cities seeking to maximize the amount of RICDs may thus be forced to choose from various recreational uses that utilized the greatest flow in water. While recreation is not defined yet in ***Colorado*** law, the term does suggest a variety of uses. Variability in seasonal flow, a factor already weighed in determining the amount of flow constituting the water right, could also weigh more heavily in the determination of reasonableness of the recreational use itself. The latter possibility is especially likely in times of dry water years, when domestic, agricultural, and manufacturing uses have preference. Debates over what types of recreation are legitimately beneficial uses of water will surely emerge as cities attempt to boost their economies by appropriating RICDs. Conceivably, the ***Colorado*** legislature eventually will have to consider creating statutory preferences. This measure, however, is unlikely because the doctrine of prior appropriation expresses preference as priority in time.

Efficiency as a Limitation

Some criticize leaving water in its natural course for the sake of maintaining flow as "wasteful" because water left in its course is not applied to a beneficial use. Indeed, the ***Colorado*** judiciary rejected the fundamental riparian principle of natural flow long ago, when it declared that the riparian doctrine made no beneficial use of water **[\*532]** and was not applicable to ***Colorado***. [[92]](#footnote-93)92 ***Colorado*** applied the concept of maximum utilization historically to promote efficient use of water in the state. In Fellhauer v. People, the ***Colorado*** Supreme Court held vested rights acquired by appropriation coexisted with the principle of maximum utilization of water, stating "the right to water does not give the right to waste it."FN 94 94 However, because the law has determined wastefulness of a use is relative to other use patterns, the legal operation of "waste" under the prior appropriation doctrine gives appropriators a disincentive to make diversions more efficient. In the past, water claimed by an appropriator but left unused or that returned to its natural channel was lost to junior appropriators. [[93]](#footnote-94)93 The concept of waste itself, however, changed when the benefit of its use is leaving it in its natural course. Objectors can no longer argue that leaving water in its course is "wasteful" or an invalid use after Golden and the modern development of ***Colorado***'s prior appropriation doctrine recognizing RICDs as a legitimate beneficial use. Until the state legislature expressly defines "waste," then, the definition of the concept will continue in terms of beneficial use. [[94]](#footnote-95)94 And, when opponents of instream flow rights argue "waste," they will really be arguing over preferred uses among competing appropriators. As Professor Getches observed, "if the city of Golden had authorized a subdivision to take the full amount of water out of the stream, no one would have objected...." [[95]](#footnote-96)95 Thus, the true threat of the instream flow right is not that it is wasteful per se, but that the consumptive uses needed to sustain population growth will be subordinate to rights to nonconsumptive uses that, though junior today, will be senior rights in the future. [[96]](#footnote-97)96

IV. Public Interest Implications

Instream Flows and Public Interest Considerations

A major criticism of instream flow rights under ***Colorado***'s doctrine is that leaving water in its natural course is riparian and directly conflicts with prior appropriation principles. [[97]](#footnote-98)97 However, as the ***Colorado*** Supreme Court noted in ***Colorado*** ***River*** Water Conservation District, the **[\*533]** test for an appropriation of water is fundamentally whether water is put to a beneficial use, and that a diversion may legitimately be accomplished by controlling water within its natural course. [[98]](#footnote-99)98 ***Colorado*** implicates public interest considerations by instream flow rights that have the effect (if not purpose) of preserving natural flows for environmental conservation.

The Public Interest in the West

In most prior appropriation states, the entity vested with the power to grant water rights -- usually a court or administrative agency -- is required to make public interest or public welfare considerations. [[99]](#footnote-100)99 Where defined by state legislatures, state courts often look to the terms of public interest statutes to determine what factors those entities should consider. For example, in Shokal v. Dunn, the Idaho Supreme Court looked to the statutory language defining instream flows to determine what factors the state's Director of Water Resources was to consider in rejecting or modifying a fishery's application for water rights. [[100]](#footnote-101)100 The Idaho court noted that public interest duties derive from the larger public trust doctrine. [[101]](#footnote-102)101 Thus, the court ultimately looked to the state laws defining, inter alia, instream flows and conservation to determine the elements of the local public interest. [[102]](#footnote-103)102 The court concluded that it was in the public interest to conserve and protect minimum flows necessary to protect fish and wildlife, recreation, aesthetics, and water quality. [[103]](#footnote-104)103

Shokal also cited the case of Young & Norton v. Hinderlider. [[104]](#footnote-105)104 In that case, the New Mexico territorial engineer denied the application for **[\*534]** water rights to an irrigation project. [[105]](#footnote-106)105 Instead, he granted rights for a storage reservoir on the ground that the reservoir served the best interest of the public. [[106]](#footnote-107)106 He concluded that the reservoir enabled residents in the surrounding vicinity to purchase water at a lower price than if the irrigation project had been approved. [[107]](#footnote-108)107 The court effectively rejected the contention that public interest concerns were limited to broad matters of public health and safety. [[108]](#footnote-109)108 The court interpreted the statutory local public interest to secure the greatest possible benefit from water for the public. [[109]](#footnote-110)109

Environmental factors also implicate public interest according to the Washington Supreme Court. In Stempel v. Department of Water Resources, an applicant sought a domestic use permit to withdraw water from a lake, which raised concerns of numerous pollution and health problems. [[110]](#footnote-111)110 The court held that legislative authority requires the agency granting the permit to consider such factors. [[111]](#footnote-112)111 The court inferred this conclusion from Washington's environmental protection laws enacted subsequent to water permit laws, which did not expressly require these considerations. [[112]](#footnote-113)112 Thus, the public welfare standard required consideration of the negative impact of appropriations on the local environment.

In contrast to the Western states that implemented public trust considerations in their water allocation schemes, ***Colorado*** purportedly follows a "pure appropriation" scheme and refuses to acknowledge the public interest as a matter of law. However, some expressions of the public interest may be found in the state's laws and, to an extent, in cases defining water rights.

Public Interest Principles in ***Colorado*** Water Law

The ***Colorado*** Constitution states "the water of every natural stream, not heretofore appropriated...is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation...." [[113]](#footnote-114)113 This provision makes it clear that the public holds rights to the state waters until appropriated. [[114]](#footnote-115)114 Further, "recognizing the need to correlate the activities of **[\*535]** mankind with some reasonable preservation of the natural environment," the CWCB is vested with the exclusive authority to maintain minimum streams flows necessary to preserve natural environments. [[115]](#footnote-116)115 This statute essentially codifies public interest principles reflected by environmental purposes. [[116]](#footnote-117)116

In holding that the State Engineer has standing as a party to file a protest in the adjudication of water rights, the ***Colorado*** Supreme Court in Wadsworth v. Kuiper stated:

There can be no question that, under the inferences in [Article XVI $ S 5 of the ***Colorado*** Constitution] . . . the public has a vital interest in preserving the water resources of this state and adhering to correct rules for the allotment and administration of water. . . . It is essential that the relief requested be granted in order that the people may have their day in court in the assertion of the public interest. [[117]](#footnote-118)117

The court reasoned that, by including the definition of "person" for the purposes of appearing at water adjudication hearings in the 1969 WRDA Act, the ***Colorado*** legislature intended to give standing to the State Engineer, who by protesting appropriations asserted the rights of the public. [[118]](#footnote-119)118 The court justified its interpretation of legislative intent by stating that "the ***Colorado*** Constitution mandates the protection of the public interest in water." [[119]](#footnote-120)119 What appears to make this expression of public interest unique from other Western states is that an equal part of the public interest is the individual right to appropriate. The State Engineer also has no express mandate to consider the public interest beyond the function of contesting appropriations on behalf of other appropriators.

In ***Colorado***, the entity granting water rights is the water court. A party may appeal the decision to the ***Colorado*** Supreme Court. The CWCB is limited to an advisory role and may only hold or give recommendations for instream flows. The ***Colorado*** judiciary has ruled in terms of the public interest peripherally at best, diverging from the legislative implementation of public interest considerations in the 1969 WRDA. In the decade following the enactment of the WRDA, the courts seemed at least willing to incorporate public interest considerations in its decisions. As indicated above, in 1977 in Wadsworth, the **[\*536]** ***Colorado*** Supreme Court specifically stated a mandate by the ***Colorado*** Constitution to protect the public interest in water, which justified the General Assembly in giving the State Engineer standing to contest adjudications. [[120]](#footnote-121)120 Then in 1979, the court again upheld controversial instream flow appropriations -- challenged as unconstitutional -- in ***Colorado*** ***River*** Water Conservation District v. ***Colorado*** Water Conservation Board. [[121]](#footnote-122)121

In 1983, the court decided the case of Alamosa La-Jara. [[122]](#footnote-123)122 At issue was the State Engineer's interpretation of the law governing priority in the context of interstate compact agreements. [[123]](#footnote-124)123 The court held that in-state users of water might have their supply curtailed in order to satisfy the essentially treated senior priority rights of out-of-state commitments. [[124]](#footnote-125)124 Important for public interest considerations, the court acknowledged the relevance of environmental factors and tempered the principle of maximum utilization by stating that

the policy of maximum utilization does not require a single-minded endeavor to squeeze every drop of water from the valley's aquifers. [Statutory law] makes clear that the objective of "maximum use" administration is "optimum use" . . . Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns. [[125]](#footnote-126)125

Seemingly, in Alamosa-La Jara, the ***Colorado*** Supreme Court mimicked the method of the Idaho court in Shokal [[126]](#footnote-127)126 by divining public interest considerations not from any existing statutory mandates, but instead from subsequent related statutes (i.e. the WRDA granting the CWCB authority to appropriate minimum flows for conservation) and academic sources. [[127]](#footnote-128)127 However, unlike the status of the law in Idaho at the ruling of Shokal, no express statutory duty to consider the public interest in allocating water rights existed in ***Colorado*** at the time when the court decided Alamosa-La Jara, nor does any such statute currently exist. Thus, it seems that the State Engineer might still administer water rights without considering public interest factors [[128]](#footnote-129)128 , in which case the **[\*537]** grounds for a challenge would be failure to effect the optimum utilization of water under the maximum utilization doctrine. [[129]](#footnote-130)129

After the Alamosa-La Jara decision, the ***Colorado*** Supreme Court looked at the case of R.J.A., Incorporated v. Water Users Association of District 6. [[130]](#footnote-131)130 In R.J.A., the ***Colorado*** Supreme Court denied a water right to an Estes Park summer resort business that wanted to remove peat moss from a mountain valley to free waters for appropriation. [[131]](#footnote-132)131 Though the case hinged on whether the waters sought from the peat bog were tributary and therefore subject to adjudication under the WRDA, again, as in Alamosa La-Jara, the court noted in terms of public interest concerns that

the water rights sought here are based upon alterations of long existing physical characteristics of the land. Alteration of natural conditions and vegetation in order to save water carries with it the potential for adverse effects on soil and bank stabilization, soil productivity, wildlife habitat, fisheries production, water quality, watershed protection and the hydrologic cycle. Whether to recognize such rights, and thus to encourage innovative ways of reducing historical consumptive uses by modifying conditions found in nature, is a question fraught with important public policy considerations. As such, the question is especially suited for resolution through the legislative process. [[132]](#footnote-133)132

While R.J.A. and Alamosa-La Jara are not monumental cases in themselves, they subtly demonstrate the ***Colorado*** Supreme Court's avoidance of fully implementing considerations of the public interest, though it clearly acknowledges the intention of the state legislature to protect those concerns. This is important because it explains, in part, why ***Colorado*** courts can today uphold that the state's doctrine of water rights remains that of "pure" appropriation. Whereas in most other Western prior appropriation states statutes require a court or administrative agency to consider the public interest in granting water rights, in ***Colorado***, the state legislature has not mandated these measures. As such, neither the ***Colorado*** water courts nor the state supreme court is required to adjudicate water rights in consideration of the public interest. Moreover, the current statutory configuration accommodates this avoidance of the public interest in the courts. As noted above, principles of the public interest appear by statute only in reference to minimum instream flows that the CWCB may appropriate and recommend for RICDs sought by local government entities. Even these provisions are not mandates, though, and since the function of the CWCB **[\*538]** is advisory only, no court adjudicating water rights in ***Colorado*** must consider public interest factors.

Hence, in United States v. ***Colorado*** ***River*** Water Conservation District, the ***Colorado*** Supreme Court rejected an argument that the beneficial use test encompassed a broad public policy to protect the environment. [[133]](#footnote-134)133 There, the court held that the consideration of the application for a conditional use decree for Arapahoe County for the construction of the Union Park Reservoir did not include evaluation of environmental factors. [[134]](#footnote-135)134 Environmental groups contended that the Union Park Reservoir would have adverse effects on such factors as "fisheries and wildlife habitat, recreation, water quality, the basin's economy including the tax base, property values and land use, and the general quality of life -- factors they deemed vitally important to the public." [[135]](#footnote-136)135 To justify its rejection of these arguments, the court reasoned that the WRDA and its subsequent amendments, in recognizing the need to protect the environment, established an adequate mechanism for protecting the concerns of the environmental groups. [[136]](#footnote-137)136 The court further explained that while environmental factors could be a "reasonable and sound basis for altering exiting law," the change from precedent would be a legislative function. [[137]](#footnote-138)137 The court further excused itself from making public interest considerations by stating:

The degree of protection afforded the environment and the mechanism to address state appropriation of water for the good of the public is the province of the General Assembly and the electorate. Conceptually, a public interest theory is in conflict with the doctrine of prior appropriation because a water court cannot, in the absence of statutory authority, deny a legitimate appropriation based on public policy. [[138]](#footnote-139)138

Finally, the enforcement of public interest principles by the ***Colorado*** Supreme Court emerged in Aspen Wilderness Workshop, Incorporated v. ***Colorado*** Water Conservation Board. [[139]](#footnote-140)139 In 1980, the water court decreed to the CWCB 12 cfs on Snowmass Creek for preserving the natural **[\*539]** environment. [[140]](#footnote-141)140 The ***Colorado*** ***River*** Water Conservation District objected to the application, claiming that the amount of flow exceeded the amount necessary to maintain a reasonable natural flow. [[141]](#footnote-142)141 Eleven years after the appropriation, the CWCB decided not to enforce its appropriation as too high as well as too low during certain times of the year because of Pitkin County's growth and development in the Aspen area. [[142]](#footnote-143)142 The Division of Wildlife initiated an investigation on behalf of the Aspen/Pitkin County Planning Office, which had contacted the Division seeking advice in dealing with instream flows in terms of snowmaking. [[143]](#footnote-144)143 The Division Wildlife found that the CWCB had erred in calculating the minimum flows for the 1980 decree. [[144]](#footnote-145)144 The Division of Wildlife, upon request of the CWCB, then refigured the winter seasonal flow requirement and concluded that indeed, the CWCB appropriated too much water. [[145]](#footnote-146)145 In light of these findings, the CWCB ultimately decided in 1992 to modify its water rights by not enforcing the full 12 cfs in sections of Snowmass Creek where flows exceeded rates recommended by the Division of Wildlife. [[146]](#footnote-147)146 Conveniently, this reduction in flows enabled the Aspen Skiing Company to increase its snowmaking operation on Snowmass Creek. [[147]](#footnote-148)147

The Aspen Wilderness Workshop, a nonprofit environmental group, [[148]](#footnote-149)148 filed suit against the CWCB, arguing that the decision not to enforce its full instream flow appropriation was tantamount to "a permanent relinquishment of a public instream flow right...." [[149]](#footnote-150)149 The ***Colorado*** Supreme Court agreed, and held that the CWCB "has a unique statutory fiduciary duty to protect the public in the administration of its water rights decreed to preserve the natural environment." [[150]](#footnote-151)150 Thus, the court ruled that the CWCB, uniquely charged with holding water rights in the public interest, was not free to appropriate its water for any purpose or beneficial use at its discretion. [[151]](#footnote-152)151 Moreover, when the General Assembly created the CWCB it did not alter the exclusive jurisdiction of the water court over the adjudication of water rights. [[152]](#footnote-153)152 **[\*540]** The authority of the CWCB was therefore limited by statute and water court adjudications accordingly. [[153]](#footnote-154)153

The court's holding prompted a dissent that specifically objected to the majority's implication of the public interest in finding a fiduciary duty by the CWCB. [[154]](#footnote-155)154 Justice Mullarkey argued in dissent that the CWCB satisfied any fiduciary duties it may have had by acting within its purported statutory authority to alter its decreed instream flows, and that no other responsibilities to the public existed. [[155]](#footnote-156)155 Further, Justice Mullarkey argued that water judges should not hear matters to determine minimum instream flows for the preservation of the natural environment. [[156]](#footnote-157)156 Thus, the issue would not be a "water matter" over which the water court would have jurisdiction. [[157]](#footnote-158)157

At first glance, it may seem that Aspen Wilderness Workshop, Incorporated presented a platform for the public interest to enter the ***Colorado*** judicial scene. However, loyalists to the idea of "pure" appropriation could rest their fears that the public trust would come to impinge on water rights, for the petitioners contesting the CWCB's actions were careful to base their challenge on a statutorily defined fiduciary duty, not on the common law public trust doctrine. [[158]](#footnote-159)158

V. Conclusion

The intersection between public policy considerations and ***Colorado*** water law thus remains limited. The initial enactment of instream flow laws in ***Colorado*** seemed to suggest that the state was following the lead of many other Western states by adapting its prior appropriation doctrine to weigh the public interest in the allocation of water rights. [[159]](#footnote-160)159 To some, the acknowledgement of maintaining flows in natural watercourses signaled the coming of the public trust doctrine. The ***Colorado*** judiciary, though, has managed to keep public interest factors out of its allocation scheme, albeit by strict statutory construction. Even after the legislative recognition of RICDs expanded the list of beneficial use to include instream flows for recreation, public interest concerns remain the province of the CWCB. Although the CWCB is **[\*541]** held to a fiduciary duty to the public while other appropriators are not, the CWCB is clearly limited to an advisory role and enjoys standing no different from that of any other appropriator, public or private. [[160]](#footnote-161)160 Additionally, should the CWCB make recommendations in the interest of conservation and the environment, those recommendations must only be considered by the water court, not adopted nor followed per se. [[161]](#footnote-162)161

According to Justice Hobbs of the ***Colorado*** Supreme Court, "there are no aspects of the public interest that cannot be protected within [the prior appropriation] framework." [[162]](#footnote-163)162 Defending the judiciary's adherence to the prior appropriation doctrine, Justice Hobbs posited that each element of the doctrine (diversion, beneficial use, and priority) is consistent with public policy concerns. [[163]](#footnote-164)163 The sections of the state constitution adopting the prior appropriation doctrine establish a stable policy for allocating an essential but scarce resource among users. [[164]](#footnote-165)164 There is nothing particularly sacred about the prior appropriation doctrine, but because ***Colorado*** chose this particular scheme, the courts must honor it as the exclusive means of allocation until the people of ***Colorado*** amend the constitution to adopt an alternative method. [[165]](#footnote-166)165

Justice Hobbs also differentiated public interest considerations (purportedly expressed by ***Colorado***'s prior appropriation system) from the public trust doctrine (rejected under ***Colorado***'s system). [[166]](#footnote-167)166 While allocation under the public trust doctrine is subject to a determination of navigability conferring a right in the public, the allocation of water rights in ***Colorado*** focuses on the right of citizens to divert water for beneficial use. [[167]](#footnote-168)167 Under the reasoning of People v. Emmert, [[168]](#footnote-169)168 since ***Colorado***'s streams were not navigable at the time of statehood, and since landowners adjacent to natural streams owned the beds and banks, the General Assembly should resolve the question of public access to the waters of ***Colorado***, not the courts. [[169]](#footnote-170)169 Criticized as resulting in uncertainty of allocation, the public trust doctrine, according to **[\*542]** Justice Hobbs, provides no standards by which the ***Colorado*** judiciary may determine allocation among competing demands for water. [[170]](#footnote-171)170

Is the Public Interest Really Expressed by Prior Appropriation?

***Colorado***'s focus on competing appropriators elevates consumptive interests over conservation interests -- unless conservation serves an economic purpose. Under a democratic model, when representative state and local governments operate as appropriators, presumably they should do so in the interest of the public. But under a prior appropriation scheme such as ***Colorado***'s, when local governments must compete for water rights with other appropriators (abuse of police power issues aside), privatization of public interest considerations occurs. The case of Golden, discussed above, provides an illustration. Developing a recreational watercourse is a reasonable means of achieving legitimate ends of revitalizing the city's business district to sustain economic growth in the community, improve aesthetics and quality of life for the city's residents. The secondary effect of drawing tourists, and specifically their money, [[171]](#footnote-172)171 is the real purpose of acquiring the water right, though. Acting on behalf of the public in this context means the city must show that leaving the water in its course -- normally viewed as a measure of environmental conservation -- is beneficial. However, the benefit cannot be for the public interest in terms of environmental conservation. Unlike the CWCB who exclusively may appropriate specifically for this purpose, local governments, by law, must appropriate instream flows for recreational (i.e. economic) purposes. [[172]](#footnote-173)172

This privatization of the public interest arguably may provide a perverted means of achieving environmental conservation. Recall that among gateway communities, redefining their community identity in terms of developing a recreation and tourism industry based on a qualitatively superior natural environment is the modern trend. Without intending, local governments could legitimately achieve dual purposes by appropriating RICDs, a prospect nonprofit conservation groups are already keenly aware of. Environmental groups like Trout Unlimited and Great Outdoors ***Colorado*** have provided major funding for some of the new boating courses constructed throughout the ***Colorado*** **[\*543]** Rockies. [[173]](#footnote-174)173 Following the Golden decision, Trout Unlimited indicated the potential for environmental groups to derive substantial benefits from RICDs sought for economic purposes by stating "[it's] not a kayaking organization, but these types of (recreational) rights do benefit fish, because they leave water flowing." [[174]](#footnote-175)174 Thus, in a somewhat distorted way, ***Colorado***'s prior appropriation doctrine might very well accommodate the public interest to some measure, at least to the extent that keeping water in its natural course constitutes a beneficial use under the law (and concurrently to the extent that cities have priority over junior users). [[175]](#footnote-176)175

Local governments see the Golden decision as a green light to proceed with plans to appropriate instream flows for similar recreational uses to revive local economies. For example, Fort Collins plans to build a whitewater kayak park in the next few years, hoping to collect significant revenue like that claimed by Golden. [[176]](#footnote-177)176 Golden apparently collects in excess of 2 million dollars annually from the kayakers and spectators drawn to its park, [[177]](#footnote-178)177 and in total, the local economy took in 23 dollars million from 45,000 park users plus accompanying spectators in the first three years of park operation. [[178]](#footnote-179)178 Vail and Breckenridge also seem to benefit substantially from their whitewater parks, enjoying increased tourism during the off-season that brings millions in sales tax revenue. [[179]](#footnote-180)179 Many municipalities with access to streams cannot resist the lure of such revenues, especially when cost comparisons project that development will yield such large monetary returns. [[180]](#footnote-181)180

Yet, as ***Colorado***'s gateway communities continue to rely on the recreation industry, tensions will result between sustaining the growth these communities desire and maintaining the environmental quality of the area that makes them appealing to visitors and businesses. [[181]](#footnote-182)181 **[\*544]** Like Golden, mountain communities hoping to grow from the recreation industry will be forced to choose (or at the very least balance) between exploiting and preserving the natural resources that are the very foundation of the new tourism/recreation industry.

One thing is for sure in the legal realm -- until the ***Colorado*** General Assembly mandates considerations of public interest factors in water rights adjudications or amends the state constitution, [[182]](#footnote-183)182 environmental conservation will justify minimum stream flows only for the CWCB. In the mean time, public interest groups will attempt to piggyback onto local government RICD appropriations. Municipal water suppliers already have become important players in the legal arena of water rights. The inherent stability as public corporations, the ability to plan for growth and development of utilities, and the ability to finance water development projects through taxing authority make municipal suppliers politically powerful at the local level. [[183]](#footnote-184)183 Moreover, the statutory provisions enabling local government entities to appropriate instream flows also makes them increasingly powerful at the state level. Market forces will also continue to push ***Colorado***'s economy toward tourism and recreation, and as gateway communities exploiting RICDs begin to sprawl as a result, public interest concerns in terms of water supply and water quality will become ever more pressing. [[184]](#footnote-185)184

Ultimately, ***Colorado*** constituencies -- from individuals to communities and local governments to private enterprise -- will have to decide whether it truly is in the best interest of all to compel public interest considerations in water allocation. On one hand, ***Colorado*** needs to sustain growth in increasingly urbanized areas in an era when traditional industries are replaced by newer ones that still depend on the bounties of the state's natural resources. On the other hand, the state also must temper that demand in order to preserve the very elements that make economic survival possible. Regardless of any desire to adhere to a water allocation scheme entrenched in history, as the preservation of the natural environment becomes more vital to local economies, ***Colorado*** lawmakers will eventually have to reconcile goals that have historically been at odds: maximum application and consumption**[\*545]** of water at present, and conservation of an economic asset for the future. [[185]](#footnote-186)185

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1. 1 See ***COLO.*** CONST. art. XVI, § § 5, 6; GEORGE VRANESH, VRANESH'S ***COLORADO*** WATER LAW 7 (James N. Corbridge, Jr. & Teresa A. Rice eds., rev. ed. 1999). [↑](#footnote-ref-2)
2. 2 The West experienced a 75 percent increase in population during the period from 1960 to 1990, during which domestic use of water rose from withdrawals of 6.5 million acre-feet ("af") to 14 million af. [↑](#footnote-ref-3)
3. 3 See Jon Sarche, Recreational Users Win Water Rights in the West, THE PHILADELPHIA INQUIRER, June 25, 2003, at A2 (stating that the popularity of outdoor sports like kayaking and fishing has helped the recreation industry gain political clout in the West). The competition among members of the recreation industry is likely to heat up as hydroelectric dams are expected to be relicensed in the next fifteen years. Id. [↑](#footnote-ref-4)
4. 4 See David F. Jankowski et al, The 1969 Act's Contributions to Local Governmental Water Suppliers, [*3 U. DENV. WATER L. REV. 20 (1999)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VW0-00C3-W0TS-00000-00&context=1516831) (noting that public water supply is particularly a function of local government, which has gained significant importance with the dual emergence of the 1969 Water Right Determination Act and rapid urbanization of the state's population); See Gregory J. Hobbs, Jr., ***Colorado*** Water Law: An Historical Overview, 1 U. DENV. WATER L. REV. 1, 16 (1997) (stating that currently municipal government entities, including quasi-governmental entities like sanitation districts, are primary parties in the water acquisition arena). [↑](#footnote-ref-5)
5. 5 See [*State Eng'r v. Golden, 69 P.3d 1027, 1028 (****Colo.*** *2003),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) aff'g by an equally divided court, en banc; Decree, In re Application for Water Rights of the City of Golden, No. 98CW448 (Water Ct. Div. 1, June 13, 2001) [hereinafter Golden Decree], available at [*http://www.courts.state.****co****.us/supct/watercourts/wat-div1/ordergolden.htm*](http://www.courts.state.co.us/supct/watercourts/wat-div1/ordergolden.htm). [↑](#footnote-ref-6)
6. 6 See, e.g., Raymond Rasker, A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands, [*65 U.* ***COLO.*** *L. REV. 369, 373 (1994).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TBT0-00CV-N06X-00000-00&context=1516831) [↑](#footnote-ref-7)
7. 7 [*Id. at 375.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TBT0-00CV-N06X-00000-00&context=1516831) [↑](#footnote-ref-8)
8. 8 See [*id. at 378.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TBT0-00CV-N06X-00000-00&context=1516831) From 1969 to 1991, most of the two million new jobs added in the Rocky Mountain West were service-related. [*Id. at 377.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TBT0-00CV-N06X-00000-00&context=1516831) While in 1969 more than 11 percent of direct employment was in the natural resource industries, by 1991, these industries provided less than 6 percent of all employment in the region, whereas service industries comprised over 81 percent of all employment. Id. [↑](#footnote-ref-9)
9. 9 [*Id. at 384.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TBT0-00CV-N06X-00000-00&context=1516831) [↑](#footnote-ref-10)
10. 10 See John W. Ragsdale, Jr., National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities, 31 URB. LAW. 1, 1-2 (1999) (describing the emergence of Vail as the quintessential modern gateway community). [↑](#footnote-ref-11)
11. 11 The town of Vail became incorporated in 1965, three years after the ski resort opened. Id. at 2, n.1. [↑](#footnote-ref-12)
12. 12 The resort town is so popular that even its manhole covers are a commodity. Marcia Martinek, Candidate, Issues and Manhole Covers, HERALD DEMOCRAT, July 23, 2004, available at [*http://www.leadvilleherald.com/archives/072904.pdf*](http://www.leadvilleherald.com/archives/072904.pdf). [↑](#footnote-ref-13)
13. 13 Of every four residences in Vail, three are occupied only a few weeks each year as second homes. Ed McMahon & Luther Propst, Park Gateways, NAT'L PARKS, May/June 1998, at 39. [↑](#footnote-ref-14)
14. 14 Rasker, supra note 6, at 378. The remote nature of rural gateway communities an economic benefit, drawing a growing number of professionals seeking to escape the urban life for a higher quality of life in the country with entire firms migrating to more remote small-town communities, a phenomenon known as "green-fielding," made possible largely because of the mobility afforded by telecommunications. Id. at 378-79. [↑](#footnote-ref-15)
15. 15 Whitewater parks extend the normal boating season by maintaining necessary stream flows in drier months. See Tom Boyd, Paddle Up; White-water Parks are Experiencing a Sort of Ripple Effect, ROCKY MOUNTAIN NEWS, Aug. 30, 2003, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)M. Whitewater parks in ***Colorado*** have been built in Boulder, Breckenridge, Denver, Durango, Golden, Gunnison, Lyons, Steamboat Springs, and Vail. Id. [↑](#footnote-ref-16)
16. 16 See Jason Blevins, Battle Looms Over Kayak Parks Critics: Recreation Sites are Wasteful Use of Water, THE DENVER POST, June 2, 2003, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)A (noting ***Colorado*** leads the nation in developing whitewater kayaking parks, with twelve parks completed and nine more planned). According to civil engineer Gary Lacey, whose company has helped design, build, or redevelop whitewater parks throughout ***Colorado***, the parks are in demand because they can revitalize downtown areas and bring visitors to resort towns during the off-season. See Boyd, supra note 15, at 1M. [↑](#footnote-ref-17)
17. 17 Success in this context relates to the economic success of resorts and the like. Communities like Vail and Aspen are not successful in terms of socioeconomic aspects of the community, in that people who work in resort communities are often unable to afford to live in the same or nearby towns. Property values have risen to astounding levels in Vail and Aspen, such that the cost of living is much higher than what may be affordable to the average person. Growth of these gateway communities has been characterized as urban sprawl, displacing the rural character of mountain communities. Bob Sachs, National Perspective on Mountain Resorts and Ecology, [*26 VT. L. REV. 515, 520 (2002).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:489R-PPH0-00B1-805S-00000-00&context=1516831) [↑](#footnote-ref-18)
18. 18 Those mountain communities that depend on tourism for the local economy rely on the character and aesthetics of natural surroundings that influence the quality of visitors' experiences. See McMahon & Propst, supra note 13, at 39-40. [↑](#footnote-ref-19)
19. 19 ***COLO.*** CONST. art. XVI, § § 5-6. [↑](#footnote-ref-20)
20. 20 [*Coffin v. Left Hand Ditch* ***Co****., 6* ***Colo.*** *443, 446-47 (1882)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) ("In the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of appropriation."). [↑](#footnote-ref-21)
21. 21 See, e.g., [***COLO.*** *REV. STAT. § § 37-92-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) to -103 (2004). [↑](#footnote-ref-22)
22. 22 [***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) [↑](#footnote-ref-23)
23. 23 VRANESH, supra note 1, at 32-33. [↑](#footnote-ref-24)
24. 24 See [***COLO.*** *REV. STAT. § 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (providing, however, that only a local government entity can control water in its natural course for recreational in-channel diversions). [↑](#footnote-ref-25)
25. 25 Id. § 37-92-103(3) (a). [↑](#footnote-ref-26)
26. 26 Id. § 37-92-102(3).

    Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the ***Colorado*** water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of ***Colorado***, to appropriate in a manner consistent with [the state constitution], such waters of natural streams and lakes as the [***Colorado*** water conservation] board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree.

    Id. [↑](#footnote-ref-27)
27. 27 [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 572-74 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) [↑](#footnote-ref-28)
28. 28 [*Id. at 574.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) There remains ambiguity in the statutory abolishment of the diversion requirement of appropriation; it could mean that the diversion requirement applies only to the instream use by the CWCB specifically authorized by statute or that the diversion requirement has effectively merged with the beneficial use element. VRANESH, supra note 1, at 38. [↑](#footnote-ref-29)
29. 29 [*Thomas v. Guiraud, 6* ***Colo.*** *530, 533 (1883)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-3060-0040-03CW-00000-00&context=1516831) ("The true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial."); VRANESH, supra note 1, at 43. [↑](#footnote-ref-30)
30. 30 [*Combs v. Agric. Ditch* ***Co****., 28 P. 15 966, 967-68 (****Colo.*** *1892).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XPD-X2H0-00KR-C50H-00000-00&context=1516831) [↑](#footnote-ref-31)
31. 31 [***COLO.*** *REV. STAT. § § 37-92-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FM-00000-00&context=1516831) to -602 (2004). [↑](#footnote-ref-32)
32. 32 ***COLO.*** CONST. art. XVI, § 6. [↑](#footnote-ref-33)
33. 33 [*City & County of Denver v. Sheriff, 96 P.2d 836, 842 (****Colo.*** *1939).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-34)
34. 34 Id. [↑](#footnote-ref-35)
35. 35 VRANESH, supra note 1, at 45. [↑](#footnote-ref-36)
36. 36 [***COLO.*** *REV. STAT. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2004). [↑](#footnote-ref-37)
37. 37 Id. [↑](#footnote-ref-38)
38. 38 The language of the current statute expressly authorizes state and local government entities to make such appropriations. Id. [↑](#footnote-ref-39)
39. 39 [*City of Thornton v. City of 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-40)
40. 40 [*Id. at 920.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-41)
41. 41 Id. [↑](#footnote-ref-42)
42. 42 Id. [↑](#footnote-ref-43)
43. 43 [*Id. at 921.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-44)
44. 44 [*Id. at 931-33.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-45)
45. 45 [*Id. at 930.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-46)
46. 46 Id. [↑](#footnote-ref-47)
47. 47 [*Bd. of County Comm'rs v. Upper Gunnison* ***River*** *Water Conservation Dist., 838 P. 2d 840, 854 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-48)
48. 48 Id. [↑](#footnote-ref-49)
49. 49 Act of June 5, 2001, S. 01-216, § 1, 2001 ***Colo.*** Sess. Laws 305, 305 (current version at [***COLO.*** *REV. STAT. § 37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2004)) (requiring local government entity to submit a copy of the water right application to the CWCB for review within thirty days of filing for an RICD adjudication); Id. (current version at § 37-92-102(6)) (stating factors to be considered and requiring findings to be made by the CWCB regarding RICD requests). Legislation also added new code sections stating standards for decisions by the water court and referees regarding RICDs. Id. § 3 (current version at § § 37-92-305(13)-(16)). [↑](#footnote-ref-50)
50. 50 Id. § 2 (current version at [***COLO.*** *REV. STAT. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)). [↑](#footnote-ref-51)
51. 51 [***COLO.*** *REV. STAT. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2000). [↑](#footnote-ref-52)
52. 52 § 2, 2001 ***Colo.*** Sess. Laws 305 (current version at [***COLO.*** *REV. STAT. § 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2004)). [↑](#footnote-ref-53)
53. 53 [***COLO.*** *REV. STAT. § 37-92-103(b)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2000). [↑](#footnote-ref-54)
54. 54 § 2, 2001 ***Colo.*** Sess. Laws 305 (current version at [***COLO.*** *REV. STAT. § 37-92-103(10.3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2004)). [↑](#footnote-ref-55)
55. 55 See Golden Decree, supra note 5. Since the City of Golden filed its application for the instream flow rights three years before the General Assembly enacted the 2001 amendments expanding the list of government entities eligible for minimum flows, the case granting the rights to the city did not rule on these issues. More likely, the 2001 amendments are a legislative confirmation of what has happened already in the state courts -- allowing local government entities other than the CWCB to acquire minimum flow rights, as long as a structure "diverts" the water for beneficial use. See, e.g., [*City of Thornton, 830 P. 2d at 929-31;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [*Upper Gunnison* ***River*** *Water Conservancy Dist., 838 P.2d at 854.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 [*Golden, 69 P.3d at 1028,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) aff'g by an equally divided court, en banc; Golden Decree, supra note 5. [↑](#footnote-ref-57)
57. 57 Like its challenges in [*City of Thornton, 830 P. 2d at 920*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) and [*Upper Gunnison* ***River*** *Water Conservancy Dist, 838 P.2d at 853,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0DK0-003D-90FD-00000-00&context=1516831) the CWCB argued the appropriation was similar to an instream flow right that only it was authorized to hold under the statute in effect at that time. See Golden Decree, supra note 5. See also William H. Fronczak, Court Report, [*5 U. DENV. WATER L. REV. 650, 652 (2002).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:46CJ-K410-00SW-50BP-00000-00&context=1516831) [↑](#footnote-ref-58)
58. 58 CWCB, the State Engineer, and the Engineer for Water Division No. 1 were the only remaining objectors after Arvada, Idaho Springs, and Coors Brewing Company withdrew statements of opposition and Golden stipulated to rights held by the municipalities of Westminster and Georgetown and the Clear Creek Skiing Company and Clear Creek County. Golden Decree, supra note 5, paras. B-C. [↑](#footnote-ref-59)
59. 59 Id. paras. D, E(1)-(2), (9). [↑](#footnote-ref-60)
60. 60 Id. para. D. Golden accomplished the physical diversion of the water in part by strategic placement of 4,000 tons of boulders creating waves, holes, and eddies. Howard Pankratz, Recreational Water Use Buoyed: ***Colo.*** High Court Lets 3 Towns Use ***Rivers*** for Kayak Courses, THE DENVER POST, May 20, 2003, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)A. [↑](#footnote-ref-61)
61. 61 Golden Decree, supra note 5, para. E(6) (decreeing flow rights put to a beneficial use, specifically the absolute cfs to range from 42 cfs in February to 840 cfs in June). [↑](#footnote-ref-62)
62. 62 Id. para. D. Golden also applied for conditional water rights for each of ten additional dam structures and deflector devices it proposed adding to the White Water Course. Id. The court distinguished daytime from nighttime use, selecting 6:00 p.m. and 6:00 a.m. as the average demarcation between light and dark. Id. para E(6). The court noted that the city was still only in the planning stage of installing lights to enable use of the Course at night, but that during the diligence period, Golden could establish actual use to secure absolute rights for 24-hour use. Id. [↑](#footnote-ref-63)
63. 63 [*City of Thornton, 830 P.2d at 930*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) (declaring the control of water in its natural course to be a valid appropriation). [↑](#footnote-ref-64)
64. 64 Golden Decree, supra note 5, para. E(7). [↑](#footnote-ref-65)
65. 65 Id. para. E(8). The water court findings highlighted testimony that the 1,000 cfs sought by the city would support such world-class competitions as the United States Olympic trials and the Eddie Bauer Classic. Id. The court was particularly responsive to the observation that thousands of dollars would be generated both by competitors using the course and spectators attending the events, concluding "Golden's ability to continue to attract such competitions depends on the possible availability of high flows in the 1,000 cfs range." Id. [↑](#footnote-ref-66)
66. 66 Id. para. E(9). [↑](#footnote-ref-67)
67. 67 Id. [↑](#footnote-ref-68)
68. 68 All of the water claimed by Golden for the whitewater course is subject to a senior call downstream in a dry water year. Id. Eighty-four percent of the water claimed is subject to a senior call downstream in an average year. Id. [↑](#footnote-ref-69)
69. 69 As part of the city's stipulations, up to 41 cfs of the instream rights are subordinated to future exchanges upstream. Id. The court also noted that the city agreed to provide 125 af of consumable dry year augmentation water in order to meet the projected full build out requirements of the county. Id. [↑](#footnote-ref-70)
70. 70 See [***COLO.*** *REV. STAT. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2004) ("Beneficial use is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made..."). [↑](#footnote-ref-71)
71. 71 Golden Decree, supra note 5, Conclusions of Law (quoting [*Bd. of County Comm'rs v. United States, 891 P.2d 952, 972 (****Colo.*** *1995);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [*Aspen Wilderness Workshop v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1263 (****Colo.*** *1995)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-72)
72. 72 [*Golden, 69 P.3d at 1028.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) [↑](#footnote-ref-73)
73. 73 See Pankratz, supra note 60, at 10A. [↑](#footnote-ref-74)
74. 74 The effect of the 2001 amendments on the adjudication of water rights appropriated by a local government entity will be tested when the water court considers an application by the city of Pueblo, whose officials participated as Amicus Curiae in the Golden case. See Margie Wood, ***Colorado*** High Court Deadlocks on Golden Guaranteed Flow Case, THE PUEBLO CHIEFTAIN, May 20, 2003. Gunnison and Longmont also applied for RICDs under the new laws. Blevins, supra note 16, at 8A. [↑](#footnote-ref-75)
75. 75 Pankratz, supra note 60, at 1A (reporting statements of Glenn Porzak, counsel for Golden). [↑](#footnote-ref-76)
76. 76 See [***COLO.*** *REV. STAT. § 37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2004) (defining local government entity as any county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district). [↑](#footnote-ref-77)
77. 77 Id. § 37-92-102(10.3) (defining an RICD to mean "minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures pursuant to an application filed by a [local government entity] for a reasonable recreation experience in and on the water."). This new breed of diversion reserved for local governments is distinguished from the "minimum stream flows" that remain vested exclusively in the CWCB under statute, which still reads "the CWCB is hereby vested with the exclusive authority...to appropriate...such waters of natural streams and lakes as the board determines may be required for minimum stream flows...to preserve the natural environment to a reasonable degree." Id. § 37-92-102(3) [↑](#footnote-ref-78)
78. 78 Id. § 37-92-102(6)(a). [↑](#footnote-ref-79)
79. 79 Id. § § 37-92-102(6)(b)(I)-(VI). In addition to the statutory definition of RICDs, regulations provide that in determining RICD applications, the CWCB shall make findings as to the appropriateness of requested RICDs for the intended use, considering in part the nature of the recreational activity and whether the requested RICD may have a negative impact on the environment of the instream flow, including the potential negative effect of constructing the diversions. See [*2* ***COLO.*** *CODE REGS. 408-3(7)(b)(vi)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G2D4-00009-00&context=1516831), (d)(iii-iv) (2001). [↑](#footnote-ref-80)
80. 80 Golden Decree, supra note 5, para. F(8). [↑](#footnote-ref-81)
81. 81 Id. [↑](#footnote-ref-82)
82. 82 Id. [↑](#footnote-ref-83)
83. 83 [***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) (2004). [↑](#footnote-ref-84)
84. 84 Id. § 37-92-103(10.3). [↑](#footnote-ref-85)
85. 85 See Blevins, supra note 16, at 8A. As of the date of this article, the water right to be granted to the District is still undecided after a recent appeal to the state supreme court. See [***Colo.*** *Water Conservation Bd. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 109 P.3d 585, 603-04 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) (remanding the case to the water court with instructions to remand to the CWCB for fact finding). The water court initially determined that the District was entitled to more than 250 cfs recommended by the CWCB, but the CWCB appealed the decision to the ***Colorado*** Supreme Court. [*Id. at 589.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) The supreme court determined that the CWCB failed to properly make findings of fact as to the minimum flows necessary for the specific uses in the District's application. [*Id. at 592*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) ("the General Assembly intended for the CWCB to analyze the application purely as submitted by the applicant, rather than to objectively determine what recreation experience would be reasonable, and what minimum stream flow would meet that recreational need."). The CWCB's failure to make its determinations based strictly on the District's application precluded proper adjudication of RICD rights by the water court. [*Id. at 603.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) The case is being watched closely by other water districts and cities for an indication of what the practical scope of a recreational instream flow right might be. See Christine Metz, Hearing Set for City Water Request, THE STEAMBOAT PILOT, July 29, 2004, available at [*http://www.steamboatpiolt.com/section/frontpagelead/story/24897*](http://www.steamboatpiolt.com/section/frontpagelead/story/24897). [↑](#footnote-ref-86)
86. 86 Id. (quoting Kathleen Curry, manager of the Upper Gunnison ***River*** Water Conservancy District). [↑](#footnote-ref-87)
87. 87 Memorandum from Dan McAuliffe, Dan Merriman & Ted Kowalski, to ***Colorado*** Water Conservation Board Members, regarding Agenda Item No. 6, Nov. 21-22, 2000 Board meeting Recreational Flow Discussion of Next Steps, available at [*http://cwcb.state.****co****.us/agendas/Nov%2000/AgendaItemNo6.pdf*](http://cwcb.state.co.us/agendas/Nov%2000/AgendaItemNo6.pdf). [↑](#footnote-ref-88)
88. 88 [***COLO.*** *REV. STAT. § 37-92-305(13)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2004). [↑](#footnote-ref-89)
89. 89 Blevins, supra note 16, at 8A. In Upper Gunnison ***River*** Water Conservancy District, the division of function and authority as between the CWCB and the water court was clarified. [*109 P.3d at 588-98.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) Construing various sections of the CWCB's enabling statute, the court held that, while the CWCB conducts fact finding and makes recommendations to the water court, its authority does not encompass "the extensive oversight and adjudicatory authority it sought [in its arbitrary determinations regarding the Upper Gunnison ***River*** Water Conservancy District application]." [*Id. at 595.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) Only factual findings by the CWCB (i.e. that an RICD would impair upstream uses under compact entitlement), are presumed correct by the water court; the recommendation of the CWCB is only to be considered as part of the record by the water court, and therefore is not presumptively correct. [*Id. at 603.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) However, the applicant still bears the evidentiary burden to rebut the presumption that the findings of the CWCB are correct. Absent such a showing based on a preponderance of the evidence standard, "the findings of the CWCB are binding on the water court." [*Id. at 596-98.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-90)
90. 90 Rosemary Winters, ***Colorado*** Supreme Court Turns Tide in Favor of Kayakers, 35 HIGH COUNTRY NEWS 3 (2003). [↑](#footnote-ref-91)
91. 91 Golden Decree, supra note 5, para. E (9). [↑](#footnote-ref-92)
92. 92 [***COLO.*** *REV. STAT. § 37-92-103(10.3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). The issue regarding the meaning of an RICD made its debut in the case of [***Colorado*** *Water Conservation Board v. Upper Gunnison* ***River*** *Water Conservancy District. 109 P.3d at 587-88.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) The court noted the ambiguity in the definition of an RICD, in particular the phrases "minimum stream flow . . . for a reasonable recreation experience." [*Id. at 592.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) The court found it "improper to defer to the CWCB's definition of a 'reasonable recreational experience,'" opting instead to engage traditional statutory construction by examining the language and legislative history behind the RICD statute. Id. n.8. [↑](#footnote-ref-93)
93. 93 See [*Coffin , 6* ***Colo.*** *at 447.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) See also [*Empire Water & Power* ***Co****. v. Cascade Town* ***Co****., 205 F. 123, 128-29 (8th Cir. 1913)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5J80-003B-K566-00000-00&context=1516831) (denying landowner from a right to leave water in its natural course without diminution for piscatorial purposes). [↑](#footnote-ref-94)
94. 94 [*Fellhauer v. People, 447 P.2d 986, 994 (****Colo.*** *1969).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831) [↑](#footnote-ref-95)
95. 95 See, e.g., [*S.E.* ***Colo.*** *Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1325 (****Colo.*** *1974);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1N70-003D-93WB-00000-00&context=1516831) [*Comstock v. Ramsay, 133 P. 1107, 1111 (****Colo.*** *1913).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRN-0RX0-0040-0363-00000-00&context=1516831) [↑](#footnote-ref-96)
96. 96 See VRANESH, supra note 1, at 44-52. [↑](#footnote-ref-97)
97. 97 Winters, supra note 90, at 3. [↑](#footnote-ref-98)
98. 98 See, e.g., Ed Quillen, Editorial, Why the Water Buffaloes are Snorting, THE DENVER POST, June 3, 2003, at [*7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831)B. [↑](#footnote-ref-99)
99. 99 See [*Rocky Mountain Power* ***Co****., 406 P.2d at 800-01;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [*Empire Water and Power* ***Co****. , 205 F. at 129.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5J80-003B-K566-00000-00&context=1516831) [↑](#footnote-ref-100)
100. 100 [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 573 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) [↑](#footnote-ref-101)
101. 101 Lori Potter, The 1969 Act and Environmental Protection, [*3 U. DENV. WATER L. REV. 70, 76 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VY0-00C3-W0TW-00000-00&context=1516831) In ***Colorado***, the entity granting water rights is the water court and the supreme court. The CWCB is limited to an advisory role and only gives recommendations for instream flows. [↑](#footnote-ref-102)
102. 102 [*Shokal v. Dunn, 707 P.2d 441, 449 (Idaho 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1P30-003D-32GK-00000-00&context=1516831) (looking also at similar laws from Alaska and California to determine the definition of public interest). [↑](#footnote-ref-103)
103. 103 [*Id. at 447, n.2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1P30-003D-32GK-00000-00&context=1516831) ("protecting the public interest is related to the larger doctrine of the public trust...'). In perhaps the strongest application of public interest considerations in a prior appropriation context, a California superior court held that even after the waters from a lake had been acquired by appropriation, "the state had an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." [*Nat'l Audubon Soc'y v. Superior Court, 658 P.2d. 709, 727 (Cal. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F0N0-003D-J1V1-00000-00&context=1516831) [↑](#footnote-ref-104)
104. 104 [*Shokal, 707 P.2d at 448-49.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1P30-003D-32GK-00000-00&context=1516831) But see [*Pyramid Lake Paiute Tribe v. Washoe County, 918 P.2d 697, 700-01 (Nev. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RXR-0RY0-003D-C06D-00000-00&context=1516831) (refusing to examine legislative intent in other contexts and limiting the definition of public trust to the state engineer's definition). [↑](#footnote-ref-105)
105. 105 [*Shokal, 707 P.2d at 448-49.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1P30-003D-32GK-00000-00&context=1516831) [↑](#footnote-ref-106)
106. 106 [*Young & Norton v. Hinderlider, 110 P. 1045 (N.M. 1910).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831) [↑](#footnote-ref-107)
107. 107 [*Id. at 1046.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831) [↑](#footnote-ref-108)
108. 108 [*Id. at 1046-47.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831) [↑](#footnote-ref-109)
109. 109 [*Id. at 1047.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831) [↑](#footnote-ref-110)
110. 110 [*Id. at 1050.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WWK0-003D-D1RS-00000-00&context=1516831) [↑](#footnote-ref-111)
111. 111 Id. [↑](#footnote-ref-112)
112. 112 [*Stempel v. Dep't of Water Res., 508 P.2d 166, 168 (Wash. 1973).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WH40-003F-W3G9-00000-00&context=1516831) [↑](#footnote-ref-113)
113. 113 [*Id. at 172.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-WH40-003F-W3G9-00000-00&context=1516831) [↑](#footnote-ref-114)
114. 114 Id. [↑](#footnote-ref-115)
115. 115 ***COLO.*** CONST. art. XVI, § 5. [↑](#footnote-ref-116)
116. 116 See [*Wyatt v. Larimer & Weld Irrigation* ***Co****., 29 P. 906, 910-11 (1892)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VW7-5130-0039-4545-00000-00&context=1516831) (concluding that the terms "public" and "people" are synonymous and intended to be so by the framers of the state constitution). See also [*Cent.* ***Colo.*** *Water Conservancy Dist. v.* ***Colo.******River*** *Water Conservation Dist., 526 P.2d 302, 304 (****Colo.*** *1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1NK0-003D-9408-00000-00&context=1516831) (noting the waters of the state and the right to appropriate are vested in the people). [↑](#footnote-ref-117)
117. 117 [***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) (2004). [↑](#footnote-ref-118)
118. 118 But see Hobbs, supra note 4, at 9 (characterizing the statute as an exception to ***Colorado***'s prior appropriation and possibly confirming at least one Justice of ***Colorado***'s high court reluctance to consider the public interest in allocating water rights). [↑](#footnote-ref-119)
119. 119 [*Wadsworth v. Kuiper, 562 P.2d 1114, 1116 (****Colo.*** *1977).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1J40-003D-930W-00000-00&context=1516831) [↑](#footnote-ref-120)
120. 120 [*Id. at 1116.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1J40-003D-930W-00000-00&context=1516831) [↑](#footnote-ref-121)
121. 121 [*Id. at 1117.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1J40-003D-930W-00000-00&context=1516831) [↑](#footnote-ref-122)
122. 122 [*Id. at 1116-17.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1J40-003D-930W-00000-00&context=1516831) [↑](#footnote-ref-123)
123. 123 [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 572, 578 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) [↑](#footnote-ref-124)
124. 124 [*Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914 (****Colo.*** *1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1620-003D-90RY-00000-00&context=1516831) [↑](#footnote-ref-125)
125. 125 [*Id. at 916-17, 919.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1620-003D-90RY-00000-00&context=1516831) [↑](#footnote-ref-126)
126. 126 [*Id. at 917, 925.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1620-003D-90RY-00000-00&context=1516831) See also VRANESH, supra note 1, at 539. [↑](#footnote-ref-127)
127. 127 [*Alamosa-La Jara, 674 P.2d at 935*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1620-003D-90RY-00000-00&context=1516831) (internal citations omitted). [↑](#footnote-ref-128)
128. 128 [*Shokal, 707 P.2d at 448*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1P30-003D-32GK-00000-00&context=1516831) (finding that although the statute creating the duty to consider public interest, it does not define the term, the legislature did provide guidance in a related statute as well as sister states and the academic community). [↑](#footnote-ref-129)
129. 129 [*Alamosa-La Jara, 674 P.2d at 935*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1620-003D-90RY-00000-00&context=1516831) (internal citations omitted). [↑](#footnote-ref-130)
130. 130 A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 342 (5th ed. 2002). [↑](#footnote-ref-131)
131. 131 Id.31 [↑](#footnote-ref-132)
132. 132 [*R.J.A., Inc. v. Water Users Ass'n of Dist. 6, 690 P.2d 823 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HT-00000-00&context=1516831) [↑](#footnote-ref-133)
133. 133 [*Id. at 824.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HT-00000-00&context=1516831) [↑](#footnote-ref-134)
134. 134 [*Id. at 828*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HT-00000-00&context=1516831) (internal citations omitted). [↑](#footnote-ref-135)
135. 135 [*United States v.* ***Colo.******River*** *Water Conservation Dist., 891 P.2d 952, 971 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-136)
136. 136 Id. [↑](#footnote-ref-137)
137. 137 Id. (internal quotations omitted). [↑](#footnote-ref-138)
138. 138 [*Id. at 972.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-139)
139. 139 Id. [↑](#footnote-ref-140)
140. 140 Id. But see [*Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 86 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) (affirming the water court's imposition of a revegetation condition upon the adjudication of a water transfer, and held that it was within the authority of the water court to "balance the beneficial use of water with the preservation of other natural resources..."). [↑](#footnote-ref-141)
141. 141 [*Aspen Wilderness Workshop, Inc. v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1260 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-142)
142. 142 [*Id. at 1253.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-143)
143. 143 Id. [↑](#footnote-ref-144)
144. 144 [*Id. at 1254.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-145)
145. 145 Id. [↑](#footnote-ref-146)
146. 146 Id. [↑](#footnote-ref-147)
147. 147 Id. [↑](#footnote-ref-148)
148. 148 [*Id. at 1255.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-149)
149. 149 [*Id. at 1255-56, n.9.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-150)
150. 150 See Court Puts Crimp in Resort Expansion; Snowmass Creek Water Rights Upheld, THE DENVER POST, June 20, 1995, at [*3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831)B. [↑](#footnote-ref-151)
151. 151 [*Aspen Wilderness Workshop, Inc., 901 P.2d at 1255.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-152)
152. 152 [*Id. at 1260.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-153)
153. 153 [*Id. at 1259.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-154)
154. 154 [*Id. at 1258.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-155)
155. 155 Id. The court further stated that the CWCB had to seek modification of its decree from the water court based on two policy considerations: 1) the original decree as a lawful order had to be given full force and effect until its terms were modified by the water court; and 2) unlike other appropriators, the CWCB was to be held to a different standard because of its unique statutory responsibilities to public and limited authority. [*Id. at 1259.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-156)
156. 156 [*Id. at 1262-63*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) (Mullarkey, J., dissenting). [↑](#footnote-ref-157)
157. 157 [*Id. at 1263.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-158)
158. 158 [*Id. at 1266.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-159)
159. 159 Id. [↑](#footnote-ref-160)
160. 160 Potter, supra note 101, at 77. [↑](#footnote-ref-161)
161. 161 See, e.g., Charles F. Wilkinson, Western Water Law in Transition, 56 U. ***Colo.*** L. Rev. 317, 335-36 (1985). [↑](#footnote-ref-162)
162. 162 [*Aspen Wilderness Workshop, Inc., 901 P.2d at 1257-58.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-163)
163. 163 See generally [*id. at 1259-60*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) (establishing CWCB's statutory authority with regard to water courts). [↑](#footnote-ref-164)
164. 164 Gregory J. Hobbs, Jr. & Bennett W. Raley, Water Rights Protection in Water Quality Law, 60 U. ***COLO.*** L. REV. 841, 874 (1989). [↑](#footnote-ref-165)
165. 165 Id. at 878-79. [↑](#footnote-ref-166)
166. 166 Id. at 879. [↑](#footnote-ref-167)
167. 167 Id. [↑](#footnote-ref-168)
168. 168 Id. at 874-75, 881. [↑](#footnote-ref-169)
169. 169 Id. at 879-81. [↑](#footnote-ref-170)
170. 170 [*People v. Emmert, 597 P.2d 1025 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-171)
171. 171 See Hobbs & Raley, supra note 164, at 881. [↑](#footnote-ref-172)
172. 172 Id. But see Charles F. Wilkinson, supra note 161, at 336 ("The recognition of the public trust doctrine in water law is the single strongest statement that historic uses must accommodate modern needs."). [↑](#footnote-ref-173)
173. 173 See, e.g., Sherry A. Caloia et al., The Water Rights Determination and Administration Act of 1969: A Western Slope Perspective on the First Thirty Years, [*3 U. DENV. WATER L. REV. 39, 51 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TT-00000-00&context=1516831) In 1997, the tourism industry in ***Colorado*** generated $ 7.1 billion in revenue and provided 112,000 jobs paying $ 1.5 billion in salaries. [*Id. at n.60.*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TT-00000-00&context=1516831) About 36 percent of ***Colorado***'s tourism dollars were spent in the mountain resort region in 1997. Id. [↑](#footnote-ref-174)
174. 174 See [***COLO.*** *REV. STAT. § 37-92-103(10.3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2004). [↑](#footnote-ref-175)
175. 175 Trout Unlimited helped fund the Golden whitewater course, and Great Outdoors ***Colorado*** funded more than half of the cost for a new whitewater park in [*Lyons,* ***Colorado****. Blevins, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) note 16, at 8A. [↑](#footnote-ref-176)
176. 176 Winters, supra note 90, at 3. [↑](#footnote-ref-177)
177. 177 The instream flow scheme is somewhat of a mixed blessing for mountain municipalities. Caloia et al., supra note 173, at 54 (noting rapid growth of towns due to the expanding resort, recreation, and tourism industries creates high demand for water flow in local streams, but upstream appropriators holding rights to instream flows obstruct growth by limiting available water supply for diversion to domestic uses). [↑](#footnote-ref-178)
178. 178 See Editorial, Recreation is a Player in State Water Rights, FORT COLLINS COLORADOAN, July 7, 2003, at A4. [↑](#footnote-ref-179)
179. 179 Id. [↑](#footnote-ref-180)
180. 180 Pankratz, supra note 60, at 10A. [↑](#footnote-ref-181)
181. 181 Recreation is a Player in State Water Rights, supra note 178, at A4. [↑](#footnote-ref-182)
182. 182 Id. (noting that the cost of building a whitewater park in Fort Collins amounts to about $ 280,000 as part of a $ 4.2 million project involving other improvements like storm drains and cleaning the riverbank). See also Charley Able, In Wake of Ruling, ***River*** Runners' Spirits Buoyed, ROCKY MOUNTAIN NEWS, May 20, 2003, at [*5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831)A. [↑](#footnote-ref-183)
183. 183 Unlike the prototypical recreation strategy of Vail in skiing and Golden in boating, Kremmling, for example, has specifically limited tourism development to minimize the industry's impact on the environment and the social and cultural assets of the small town. See Rasker, supra note 6, at 384. [↑](#footnote-ref-184)
184. 184 The prospect of amending the state constitution is not far from the minds of ***Colorado*** citizens. As recently as 1996 there has been an attempt to amend the state constitution by adding a public trust mandate to Section 5 of Article XVI. See [*MacCravey v. Hufford, 917 P.2d 1277, 1278 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YX10-003D-91KB-00000-00&context=1516831) (holding that initiative seeking to amend state constitution did not violate single-subject requirement). [↑](#footnote-ref-185)
185. 185 See Jankowski et al., supra note 4, at 22. [↑](#footnote-ref-186)