

# [***ARTICLE: RECREATION WATER RIGHTS: "THE INSIDE STORY"***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4VW5-7SC0-00SW-508D-00000-00&context=1516831)

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**Author:** GLENN E. PORZAK, STEVEN J. BUSHONG, P. FRITZ HOLLEMAN, & LAWRENCE J. MACDONNELL

**Text**

**[\*210]** **I. INTRODUCTION**

The primary water uses in ***Colorado*** have evolved from mining to agriculture to large-scale municipal and industrial uses. There is, however, another emerging water use moving onto the stage, and that is recreation. The phenomenal surge in the demand for water for recreation reflects both the changing nature of ***Colorado***'s economy, and the flexibility found in existing water law and policy. This paper focuses on the significant evolution of ***Colorado*** water law between 1997 and 2006 that has created greater security for recreational water rights.

A recreational water right is based on the traditional concepts of water appropriation in ***Colorado***. First, there is a diversion of water by structures that concentrate and control specified flows. Second, there is beneficial use as these diversion structures create water features that are used by kayakers, canoeists, rafters, inner tubers, and other boaters. Third, there is a need to protect a community's investment in its "boating park" and the recreation based economies that have that have grown around these parks. This is accomplished by obtaining a priority for a water right sufficient to protect the recreational use against future upstream diversions and exchanges. In short, just like a traditional water right appropriation for any other purpose, recreational water rights involve a direct human use of water to generate an economic benefit that is protected under the priority system.

But that is where the tradition ends. The recreational water rights that are the subject of this paper are diverted and used within the historic stream channel. In the eyes of many of ***Colorado***'s most powerful water users--sometimes referred to as the "water buffaloes"--when it comes to water appropriation, "traditional" has meant only out-of-channel diversion and water consumption. The only exceptions tolerated were hydropower uses and the State-owned minimum instream flows to protect the natural environment to a reasonable degree. While the latter water rights are instream, non-consumptive uses like recreational water rights, they have been tolerated because they are limited to very low flows and may not be appropriated or owned by **[\*211]** local governments or private parties. Instream flows may only be held by the ***Colorado*** Water Conservation Board ("CWCB"), a state board generally controlled by traditional water users. In a dry year like 2002, when those minimum streamflows needed to be enforced the most, ***Colorado*** water politics prevented the CWCB from calling for any of its instream flows during the entire irrigation and domestic storage season.

The recreation water rights discussed in this paper are different from the state-held minimum stream flows. First, they involve control and possession of water using man-made structures. Second, they are for beneficial uses of certain flows of water at and between the structures. Third, they are not appropriated directly for environmental purposes, but for recreation use, and the appropriator is putting water to use for economic benefit. Most significantly, unlike CWCB-held instream flows, the new recreation water rights have been secured for very large flows. To the traditionalist water buffaloes, these large, non-consumptive, in-channel, recreation rights in the hands of non-state entities were, and remain to a lesser degree, western water law heresy.

Recreational water rights are controlled by local governmental entities whose area economies are dependent upon boaters, and the spectators that flock to these communities to watch special competitive events. These communities are less vulnerable to state water politics, and will call for their water in a dry year when enforcement of their water right is truly needed.

The greatest threat to the water buffaloes was the sheer size of most recreational in-channel diversions--claims that ranged up to 1800 cubic feet per second ("cfs"). [[1]](#footnote-2)1 To them, it was irrelevant that none of the water used for recreational purposes was consumed. To them, it was irrelevant that agricultural diversions hold senior rights to nearly ninety percent of the State's water, [[2]](#footnote-3)2 while generating less than one percent of ***Colorado***'s gross product. [[3]](#footnote-4)3 To them, it was immaterial that the municipal diverters held senior rights to significant amounts of water, and that it was primarily citizens of the large Front Range municipalities who traveled to and utilized the new boating parks. To them, it was irrelevant that the Western Slope boating parks could function off of flows that ***Colorado*** is already obligated to deliver at the State line to meet its ***Colorado*** ***River*** Compact obligations. To them, it was **[\*212]** irrelevant that the tourist and recreation based industries are among the State's largest and most important industries, and the largest industry on the Western Slope. Rather, the traditionalists' primary concern could be summed up in one word--control. The water buffaloes put up a vigorous, yet ultimately unsuccessful, fight to stop what they believed to be a non-traditional use that they did not control.

To counter an unprecedented level of opposition, the proponents engaged in a decade long effort between 1997 and 2006 to protect recreational water rights as a legitimate use of ***Colorado***'s water and ensure that such rights were not consigned to second-class status under ***Colorado*** water law. As a result of a unique coalition of local governments, recreationalists and environmentalists, recognition of recreational water rights expanded from grudging acceptance of the ability to appropriate just enough water for boat passage (55 cfs in the *Ft. Collins* case), [[4]](#footnote-5)4 to high flow decreed water rights of 1400 cfs in Steamboat and 1800 cfs in Chaffee County, [[5]](#footnote-6)5 and finally to statutory recognition in 2006 of the ability to appropriate as much as fifty percent of the historic average volume in a ***river*** channel at a boating structure. [[6]](#footnote-7)6

This article begins with the application for recreation water rights filed by the City of Golden in 1998. It turns next to the 2001 legislative enactment of Senate Bill 216 during a break in the Golden trial. The article then discusses the applications for boating parks by the towns of Vail and Breckenridge, and the ultimate deadlock by the ***Colorado*** Supreme Court in reviewing the CWCB's appeal of the Golden, Vail, and Breckenridge decrees, thereby upholding the first large flows for in-channel recreation uses. It then considers the ***Colorado*** Supreme Court's decision in *Upper Gunnison* ***River*** *Water Conservancy District v.* ***Colorado*** *Water Conservation Board* [[7]](#footnote-8)7 and the CWCB's rulemaking response. The article then discusses the State's all-out litigation stance that occurred between 2003 and 2005 over the claim by the City of Steamboat Springs, as well as the stipulated decree entered in the claim by Chaffee County on behalf of the City of Salida and the Town of Buena Vista. The article also considers the legislative response to these various water court claims and decrees, including the attempt to kill recreation rights with Senate Bill 62 in 2005, and the emergence of **[\*213]** a compromise bill, Senate Bill 37, in 2006. Finally, it offers some observations and conclusions.

**II. CREATING A FULL RECREATION WATER RIGHT: THE CITY OF GOLDEN WHITE WATER COURSE (WATER DIVISION 1 CASE NO. 98CW244)**

A. BACKGROUND -- THE *FT. COLLINS* DECISION

In 1992, the ***Colorado*** Supreme Court recognized for the first time an appropriative water right for in-channel use to support boating. [[8]](#footnote-9)8 A central issue in the case was whether the City of Fort Collins could claim a water right for a boat chute built into an old diversion dam (the "Power Dam") on the Cache La Poudre ***River***. [[9]](#footnote-10)9 In its final decision, the Supreme Court interpreted the statutory definition of a diversion and held the boat chute constituted a diversion of water, and the use of the diverted water for recreation by boaters and tubers constituted a beneficial use. [[10]](#footnote-11)10 The court thus found the requirements of an appropriation of water under ***Colorado*** law had been met, and granted the City a water right decree to protect these uses. [[11]](#footnote-12)11

The CWCB opposed the Fort Collins application. The court rejected the CWCB's argument that the claimed right was a statutory instream flow water right delegated to the CWCB's exclusive control. [[12]](#footnote-13)12 Distinguishing the CWCB's instream flow rights, the court noted the recreation right claimed by Fort Collins required a man-made diversion structure for the control of water to allow the intended beneficial **[\*214]** use. [[13]](#footnote-14)13 Instream flow rights, on the other hand, do not require control of the water by a man-made structure and instead represent minimum flows for a stream reach, the purpose of which was not recreation but to help preserve the natural environment to a reasonable degree. [[14]](#footnote-15)14 The court noted that an instream flow right usually signifies the complete absence of a man-made diversion or control structures and that even in-channel diversion structures were inconsistent with the statutory instream flows. [[15]](#footnote-16)15

B. THE GOLDEN BOATING PARK

The idea for a boating park on Clear Creek in Golden emerged from citizen initiative, primarily from kayakers who wanted a place to practice their skills in the Front Range metropolitan area, and who were convinced that Clear Creek, as it exits the mountains and passes through downtown Golden could be transformed into an exceptional whitewater venue. Pushed by the kayakers, the City hosted a series of public meetings at which the idea was thoroughly discussed. Initially reluctant City officials were eventually convinced that not only was construction of the proposed park feasible, but that such a park would attract large numbers of people to the downtown area and help spark a much-needed revitalization.

The Golden City Council approved the construction of the boating park with the intention of building a facility that would draw boaters from around the Front Range of ***Colorado*** and would be capable of hosting elite and Olympic-caliber events that would attract people from around the country, and even around the world. Based on the input received from kayakers, rafters and park supporters, and after considering historic flow data, Council directed the construction of a world-class boating park.

The City hired Gary Lacy, a world-renowned course designer, expert engineer, and avid boater, to design the course. Mr. Lacy designed the course to operate optimally at a flow rate of 1000 cfs. [[16]](#footnote-17)16 The original course consisted of seven structures, using 4000 tons of rock and 800 tons of grout or cement. [[17]](#footnote-18)17 The diversion dams were designed and built to be natural in appearance, but at the same time were highly engineered structures built eight feet down into the streambed and fifteen feet into each stream bank. [[18]](#footnote-19)18 The dams were built with low-flow **[\*215]** and high-flow boating channels or chutes to concentrate the water under different hydrologic conditions. The structures completely modified what had been a uniform stream channel. Spectator seating was constructed adjacent to the course.

The enormous popularity of the initial boating park prompted City Council to authorize construction of an "extension" that would lengthen the course and add more features. Then, on December 30, 1998, the City filed for water rights to ensure there would be sufficient flows in Clear Creek to protect the investment it had made in the boating park. [[19]](#footnote-20)19 Just as important, the City sought to protect the significant secondary economy that had grown around the boating park, and which had already helped to revitalize the downtown, ***river***-corridor economy.

C. THE GOLDEN APPLICATION

Golden's application sought conditional and absolute water rights for the diversion structures in the boating park. Golden asked for confirmation of absolute rights for a portion of the claimed flow rates for the seven structures already built and in use on Clear Creek, ranging from a high of 992 cfs to a low of 75 cfs, based on measured instantaneous peak flows at the closest gage during each month in 1998. [[20]](#footnote-21)20 The City requested conditional rights for flow rates at the same structures that varied by month, up to 1000 cfs in May, June and July. This was based on the design capacity of the park and the hydrology of Clear Creek. Golden also sought conditional water rights for the additional structures it contemplated building in the boating park extension. The application was specifically based on the statutory definition of diversion at ***Colorado*** Revised Statutes ("C.R.S.") section 37-92-103(7), as expressly interpreted in the *Ft. Collins* decision. [[21]](#footnote-22)21

D. THE WATER COURT PROCESS

Eight parties, including the CWCB, filed statements of opposition to Golden's claim. [[22]](#footnote-23)22 The State Engineer intervened in 2000. [[23]](#footnote-24)23 Golden settled with all actual water users, but was unable to reach agreement with the CWCB and the State and Division Engineers ("State"). With **[\*216]** no actual water rights that could be injured by the application, these State entities pressed the case to trial to further their firm position that in-channel water rights for recreation purposes could not be decreed to the City under ***Colorado*** law. As one State witness explained, the only acceptable term and condition ever offered by the State in settlement was that Golden withdraw the application. [[24]](#footnote-25)24

In ruling on pretrial evidentiary motions, District Court Judge Jonathan Hays noted the unique factual questions presented by Golden's claim for an in-channel water right for its boating park. [[25]](#footnote-26)25 His ruling articulated the water court's view concerning the applicant's burden: "Golden's burden is to establish that the flow rates it seeks do not exceed the reasonable rates needed to fulfill its stated purpose." [[26]](#footnote-27)26 With this road map from the court, Golden was able to prepare to meet its burden at trial.

The State offered numerous grounds for opposing Golden's claim. Among other theories, the State argued Golden's claims were in fact instream flow water rights, and that only the CWCB was authorized to appropriate water for instream flow purposes. [[27]](#footnote-28)27 Despite the clear holding in the *Ft. Collins* case, the State further argued Golden's whitewater course structures did not constitute a "diversion" of water within the statutory definition at [*C.R.S. section 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). Citing the definition of "beneficial use" at [*C.R.S. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), the State argued that Golden could not demonstrate that the amount of water it claimed was "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." [[28]](#footnote-29)28

While the State's grounds for opposition continually changed and expanded, ultimately the State's main argument became that the court should develop a "duty of water" for boating parks, limiting the size of any water rights that could be claimed to only that which would allow some minimally reasonable boating experience (i.e. just enough water to float a boat). The State advanced this argument notwithstanding Golden's undisputed intent to develop a "world-class" boating park. [[29]](#footnote-30)29 At the heart of the State's opposition, and underlying all of its arguments, was the State's assertion that recreation was a lesser or **[\*217]** second-class use of water that either should be denied or severely limited to preserve the water for future, traditional consumptive uses.

In responding to the State's "duty of water" argument, Golden argued that no matter how the State dressed up the argument, its attempt to cap the size of Golden's recreation right to an amount less than Golden's actual or intended beneficial use was contrary to the right to appropriate the unappropriated waters of the State guaranteed by Article XVI, section 6 of the ***Colorado*** Constitution. [[30]](#footnote-31)30 Moreover, in attempting to limit Golden's right to preserve water for some future, undefined consumptive use, the State's argument amounted to a public trust-type argument in reverse.

The public trust doctrine has been used in some states to limit or preclude proposed or existing water rights in order to ensure water is left in the stream to protect certain future public uses of water without water rights, such as recreation, boat passage and the environments. [[31]](#footnote-32)31 The irony in the Golden case was that the State was making this argument so that future water appropriators could further deplete (not protect) the stream. Golden pointed out that ***Colorado*** courts had repeatedly rejected the public trust doctrine when it came to setting aside water for environmental benefits, and argued that the doctrine could not now be invoked to preclude a water right for a demonstrated, current beneficial use in favor of hypothetical future appropriations. Golden cited *Board of County Commissioners v. United States*, for the proposition that "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." [[32]](#footnote-33)32 It was almost worth the fight just to see the water buffaloes have to defend a public trust doctrine they have fought so vigorously against in the past.

In its trial brief, Golden cited the diversion statute, [*C.R.S. section 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), the *Ft. Collins* decision, and other ***Colorado*** Supreme Court cases for the proposition that a diversion in the conventional sense, meaning removing water and carrying it away from the stream, **[\*218]** was never a strict requirement of prior appropriation law in ***Colorado***. [[33]](#footnote-34)33 On the "beneficial use" question, Golden pointed out that the term was not defined in the ***Colorado*** Constitution. Case law was very clear that what constitutes beneficial use is a question of fact and depends upon the circumstances in each case. [[34]](#footnote-35)34 Golden spent considerable time at trial proving the economic value of recreational uses of water, a value that vastly exceeded the economic value of most agricultural water uses. Agriculture accounts for about ninety percent of all water consumption in ***Colorado***. [[35]](#footnote-36)35 Golden's recreation use, by contrast, creates enormous economic value without consuming a drop of water. All of the water used in the course would be immediately available for use and re-use downstream of the kayak park.

With its opening argument at the water court trial, Golden suggested that if it had built a hydropower project on the banks of Clear Creek and sought a 1000 cfs flow rate, the State would not have filed its opposition. [[36]](#footnote-37)36 Golden noted there were only two differences between its boating park water right and a more "traditional" hydropower right. First, the recreation rights would not dewater the stream. Second, the kayak course generated more revenue for the City than a hydropower plant. Testifying on behalf of Golden, Dr. Robert Raucher **[\*219]** conservatively estimated the present and future value of Golden's whitewater course to be $ 23 million. [[37]](#footnote-38)37

On the issue of intent, Golden's Director of Public Utilities, Dan Hartman, testified that the City wanted to develop a "world-class" facility to draw people into the area, revitalize the downtown, and maximize the economic benefits to the City. [[38]](#footnote-39)38 Gary Lacy, the designer of the course and an expert engineer and kayaker, explained the structures in the boating park, their function and hydraulics, and their optimum design capacity of 1000 cfs. [[39]](#footnote-40)39 Various business owners testified about the importance of the boating park to the local economy. Dr. Jeris Danielson, the former State Engineer, further explained how the structures controlled the amount of water claimed, and offered his expert opinion that Golden's water rights were administrable by the State Engineer's Office and that Golden's claim met the requirements of a traditional ***Colorado*** water right appropriation. [[40]](#footnote-41)40

The State based a great deal of its opposition to the Golden claim on the testimony of its outside "boating expert," Dr. Bo Shelby, a sociologist from Oregon with experience in quantifying the needs of boaters in the context of decisions about dam and hydropower operations. Dr. Shelby supervised a survey of boaters that had used the Golden boating park, and offered his opinion that the Golden claim was excessive. [[41]](#footnote-42)41

While seriously questioning the value of the opinion testimony the State's outside expert offered, Golden did not object to the raw data he had collected in the surveys on course use. In fact, the survey information was ultimately helpful to the court in determining the extent of beneficial use. The survey demonstrated that the boating park was beneficially used at flows of 1000 cfs and greater, and was extensively used throughout the year. Among other findings, the State's collected data showed the mean user in the sample had used the course 100 times, and traveled 47 miles from home to get there. [[42]](#footnote-43)42 The survey also demonstrated that many kayakers had used, or would like to use the boating park at night. One survey respondent commented that the Golden boating park was "among the best courses anywhere." [[43]](#footnote-44)43 **[\*220]** Another said, "If there were lights, there would be folks there all night long." [[44]](#footnote-45)44

E. BREAK IN THE GOLDEN TRIAL AND ATTEMPTED EMERGENCY LEGISLATIVE OVERRIDE

The first phase of the trial ended on March 15, 2001. At that time, it was scheduled to continue for one additional day on May 10, 2001. [[45]](#footnote-46)45 During this break in the trial, the CWCB drafted a bill that became Senate Bill 216, regarding what have come to be called "recreational in-channel diversions" ("RICDs"). Ordinarily, bills cannot be introduced into the ***Colorado*** General Assembly at such a late point in the legislative session. Nevertheless, SB 216 gained late-bill status from legislators sympathetic to the CWCB's traditional view of water rights. As originally proposed by the CWCB, the bill would have given the CWCB almost complete authority to decide RICD applications, subject to water court review only under the "arbitrary and capricious" standard. [[46]](#footnote-47)46 The bill would have applied retroactively to Golden's application even though it was filed in 1998 and the trial on the application was almost complete. In short, it was originally an effort to severely limit or outright kill RICDs. At best, it was an effort to make RICDs a second-class water right. As discussed in Section III below, the bill that finally emerged was much modified, and, after a thorough legislative battle, essentially ratified RICDs as a beneficial use of ***Colorado*** water.

F. THE WATER COURT DECISION

Upon completion of the trial, the water court decreed the full amount of the water rights claimed by Golden. [[47]](#footnote-48)47 In doing so, the court pointed out the boating park was used both day and night, and found **[\*221]** Golden was entitled to absolute rights for the flow rates as measured at the Clear Creek Gauge for the time periods when the course had been used by boaters as of the time of trial, and granted conditional rights for the full claimed remaining amounts, including the 1000 cfs highflow claim. [[48]](#footnote-49)48

The court held that the seven structures that had been built at the time of trial controlled water within the statutory meaning of the term "diversion" in [*C.R.S. section 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), and as the diversion requirement had been further explained in the *Ft. Collins* decision. [[49]](#footnote-50)49 The court found the structures were designed for optimal effect at 1000 cfs, and that, at this flow, the structures created waves and jets of water, self-scouring pools, hydraulic holes, large changes in current direction, and other whitewater features important to boaters. [[50]](#footnote-51)50

The court offered a detailed finding explaining that the full claimed amounts had or could be put to beneficial use. Most importantly, the court found that the boating park received greater use, and Golden received greater economic benefit, as the flows increased, so that the greatest use and greatest economic benefit were at the high flow rate of 1000 cfs:

The Court further finds that this beneficial use at the conditional amount claimed is reasonable and there is no waste as the higher the flows, the greater the Course usage, and attendant economic benefit. The testimony was unrebutted that when flows are at the 1000 cfs level, the Course is accessible to intermediate, advanced-intermediate, expert, and even world-class boaters. Intermediates use easier parts of the Course, while more experienced boaters utilize more challenging structures in the Course.

. . .

In addition, the Court finds that the Golden Course is perceived by many boaters as the best in the area. That reputation translates directly into economic value for the City in that it attracts boaters from across the State, the Country, and even international competitors. The Court finds that the reputation of the Course is in large part due to the high flows.

The Court concludes that high flow rates are a critical component of the Course as an attraction and amenity for Golden. For all of the foregoing reasons, the Court concludes that flows of up to 1,000 cfs can and will be put to beneficial use and not wasted. [[51]](#footnote-52)51

The court expressly found Golden's appropriations to be reasonable for the purposes for which they were claimed, and rejected the **[\*222]** CWCB's attempt to set aside water for future consumptive uses. Citing the statutory definition of "beneficial use" at [*C.R.S. section 37-92-103 (4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), the court explained:

The question, therefore, is not whether the amount of water claimed is "reasonable" in the abstract, or as compared to other potential future uses of the water, but whether the amount claimed is reasonable for the purposes for which Golden made the appropriation. When tested against Golden's purposes . . . the Court concludes that the 1,000 cfs claimed by Golden in May, June and July, and the lesser amounts claimed in the other months of the year, are reasonable. [[52]](#footnote-53)52

On this point, the court specifically noted: "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. [[53]](#footnote-54)53

In further assessing the reasonableness of Golden's claim, the court referenced Golden's stipulations with all actual water users on Clear Creek. [[54]](#footnote-55)54 The court explained that Golden was adding a new use onto water that was already mostly subject to downstream senior calls, so that in a dry year, 100% of the claimed water was already subject to a call; in an average year, roughly eighty-four percent of the water that would pass through the structures was already subject to a downstream senior call. [[55]](#footnote-56)55

In perhaps the most stunning rebuke of the State's case, the court offered a detailed finding discounting the testimony of the State's $ 385 per hour boating expert:

The Court further finds that the testimony of the State's expert witness, Dr. Bo Shelby, does not assist the Court in rendering the decision on "beneficial use" and "reasonableness" that must be made in the context of the ***Colorado*** appropriation doctrine. Water rights in ***Colorado*** are quantified according to the amount of water that is reasonable to serve the appropriator's intended beneficial use. Dr. Shelby did not take into account the intent of the appropriator, the City of Golden. On this point, Dr. Shelby did not consider one of the major elements of his own methodology; namely, the decision **[\*223]** environment, which in this instance is the law in ***Colorado*** on the appropriation of water. Instead, his opinions were based on a survey of a small group of Course users. The survey results purportedly offered the flow numbers that kayakers prefer for different boating opportunities, but the Court notes that those numbers are inconsistent with the kayakers' narrative comments about the Course, which expressed a clear preference for higher flows. [[56]](#footnote-57)56

The court further found that Golden's boating park water right would have no impact on ***Colorado***'s ability to fully use its compact entitlement:

Because the rights sought in this matter are on Clear Creek in Golden, immediately upstream of major industrial, municipal and agricultural diversions of area in-state water users, it will not negatively impact ***Colorado***'s ability to use its compact entitlements. The unrebutted testimony of the former State Engineer, Dr. Danielson, established that the water diverted by the Course . . . will be beneficially used and reused by downstream appropriators up to seven times before it reaches the ***Colorado***-Nebraska state line. The State conceded at trial that there is no adverse impact on ***Colorado***'s compact entitlement as a result of this water right. [[57]](#footnote-58)57

The court entered its decree on June 13, 2001, awarding Golden the full amounts of the absolute and conditional flows claimed. [[58]](#footnote-59)58

G. SIGNIFICANCE OF THE GOLDEN DECREE

The Golden case expanded previous notions of what a recreational water right could be. It took the legal precedent provided in the *Ft. Collins* decision and developed it into a full-fledged appropriative water right. In place of the notch in the dam that was addressed in the *Ft. Collins* case, Golden's appropriation involved a series of specially designed instream structures, engineered to generate particular whitewater features favored by boaters at high rates of flow. In effect, each of these structures functioned like a dam, controlling and shaping water flows in the manner desired for the intended boating uses. Rather than a minimum appropriation for safe boat passage, Golden requested and obtained an appropriation consistent with operation of a "world class" boating park. While nonconsumptive, the decreed flows **[\*224]** represented most of the hydrograph available in that reach of Clear Creek. The case established the fundamental principle that the reasonableness of the flow rates claimed for a boating park depends on the intent of the appropriator--the kind of recreation and boating experience the appropriator intended to establish with its boating park. In this respect, the water court simply confirmed that recreation water rights should be treated like other water rights under the ***Colorado*** appropriation doctrine. [[59]](#footnote-60)59

The case stirred widespread opposition among traditional water interests. Used to viewing the prior appropriation doctrine as the special purview of those whose water uses required removal of water from a stream channel, as well as water consumption, these interests fiercely resisted this new form of in-channel appropriation. Yet, in one of the great ironies of the entire battle over recreational in-channel diversions, the Golden application triggered a legislative initiative that initially sought to legislate such rights out of existence, but instead, ultimately served to confirm and bolster the legal foundation for such rights.

**III. SENATE BILL 216**

At the aforementioned March 2001 break in the Golden trial, and perhaps anticipating that it would lose, the CWCB persuaded Senator Lewis Entz and Representative Lois Spradley to introduce a late bill "Concerning the Establishment of a Procedure for the Adjudication of a Recreational In-Channel Diversion by a Local Government." [[60]](#footnote-61)60 As originally written, the bill ("SB 216") would have given the CWCB substantial authority over RICDs. The applicant was to provide the CWCB a copy of its application prior to its filing with the water court. [[61]](#footnote-62)61 The CWCB was to review the application and make an administrative finding whether or not to grant the application. [[62]](#footnote-63)62 Water court consideration of any RICD claim was then limited to review on the administrative record, under an arbitrary and capricious standard. [[63]](#footnote-64)63 The bill would have applied retroactively to all pending RICD applications. [[64]](#footnote-65)64 In short, the State agency opposing the Golden recreational water right **[\*225]** application in court would have been given almost complete authority to decide that Golden's claim should be denied.

As substantially revised in the legislative process, the role of the CWCB was altered so that it became simply a fact-finder for the water court. The final bill also limited the class of entities that could hold these rights to local governments (county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district). [[65]](#footnote-66)65 Factors to be considered in the CWCB review process were identified as: (1) potential impairment of ***Colorado***'s ability to consumptively use its compact entitlements; (2) the appropriateness of the proposed stream reach; (3) whether there is access for the proposed use; (4) whether the proposed diversion would injure instream flow water rights; and (5) whether the proposed diversion would promote maximum utilization of the waters of the state. [[66]](#footnote-67)66 Under the final bill, the CWCB is to make a recommendation to the water court concerning whether to grant, grant with conditions, or deny the application based on written findings. [[67]](#footnote-68)67 The CWCB findings were presumptively correct in water court, subject to rebuttal. [[68]](#footnote-69)68 The bill defined "recreational in-channel diversion" as "the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures … for a reasonable recreation experience in and on the water." [[69]](#footnote-70)69 Applications filed prior to January 1, 2001 were exempted from the provisions of the bill, thus "grandfathering" the Golden, Breckenridge, and Vail claims from the new legislation, and allowing these cases to be tried under pre-SB 216 water rights law. [[70]](#footnote-71)70

Far from being a repudiation of the *Ft. Collins* case, SB 216 as amended in the legislative process became a codification of that decision. The Legislative Statement for SB 216 explained:

SB 216 is designed to ensure that decrees for recreational in-channel diversions, as recognized by the ***Colorado*** Supreme Court in the City of Thornton v. City of Fort Collins case, are integrated into the state prior appropriations system in a manner which appropriately balances the need for water based recreational opportunities with the ability of ***Colorado*** citizens to divert and store water under our com **[\*226]** pact entitlements for more traditional consumptive use purposes, such as municipal, industrial and agricultural uses. [[71]](#footnote-72)71

The Legislative Statement further provided: "Finally, nothing in S.B. 216 is intended to create a water right which did not previously exist by virtue of state Supreme Court interpretation of ***Colorado*** statute. . . ." [[72]](#footnote-73)72 Clearly, and despite arguments that would come in later RICD litigation, SB 216 did not create new water rights. All of the case law on recreational in-channel diversions developed prior to SB 216 remains relevant even after the statute.

In another irony of this water battle, legislative icon Lewis Entz would lose his bid for reelection in 2006, in large measure due to his opposition to recreation water rights. His district included areas of the State in which recreation, including water-based activities, are an increasingly important part of the economy. Those areas overwhelmingly voted against his reelection.

**IV. STATE APPEAL OF THE GOLDEN DECISION TO THE *COLORADO* SUPREME COURT**

The State Engineer and the CWCB filed their appeal of the Golden case with the ***Colorado*** Supreme Court in 2001. The importance of this case is demonstrated by the number of parties filing amicus briefs: forty six in total, roughly evenly split between support for Golden and support for the State.

A. MOTION TO DISQUALIFY JUSTICE HOBBS

In preparing for the Supreme Court, attorneys for Golden faced a difficult question: what to do about the participation of one of the members of the Court, Justice Gregory Hobbs. Until his appointment to the bench in 1996, Justice Hobbs served as general counsel to the Northern ***Colorado*** Water Conservancy District ("Northern District"), and his former law firm continued as its legal counsel. He represented the Northern District in its opposition to the City of Fort Collins' filing for recreation water rights. [[73]](#footnote-74)73 In the Golden appeal, the Northern District filed an extensive "amicus" brief with the Supreme Court in support of the CWCB. [[74]](#footnote-75)74 The CWCB's opening brief in the Supreme Court, and a number of the amicus briefs filed in support of the CWCB's **[\*227]** position, contained substantially the same arguments made by Justice Hobbs in a brief written in opposition to the Fort Collins' application. Eric Wilkinson, general manager of the Northern District, also served as a member of the CWCB board and had produced a briefing paper for the board expressing considerable skepticism about recreation water rights. [[75]](#footnote-76)75 Despite these red flags, it was not easy for Golden to ask a well-respected Supreme Court Justice to disqualify himself.

There were intense discussions among Golden and all of the amicus parties supporting its position, as well as consultation with former justices regarding whether a motion to disqualify should be filed. Opinion was equally divided. Many expressed concern over the effect it might have on future cases that they would have before the ***Colorado*** Supreme Court. In the end, however, it came down to what was in the best interests of the client, the City of Golden. When analyzed on that basis, the decision was clear. Golden filed a motion to disqualify Justice Hobbs. [[76]](#footnote-77)76 Although the Supreme Court denied the motion, Justice Hobbs voluntarily recused himself after the motion was filed. [[77]](#footnote-78)77 Justice Hobbs' nonparticipation would turn out to be a critical moment in the RICD story, as the quest for large in-channel recreation water rights may have been cut short by a Supreme Court loss at such an early stage of the movement.

B. THE STATE'S ARGUMENTS IN THE SUPREME COURT

In its Opening Brief in the Supreme Court, the State distilled its trial court arguments and pushed three main theories. First, it argued that Golden's water right was an impermissible instream flow, and that recreation was only a recognized beneficial use of water in ***Colorado*** when it occurs at an impounded dam. [[78]](#footnote-79)78 Second, the State argued the structures in the Golden course did not sufficiently control the flows so as to constitute a statutory "diversion" of the type recognized in the *Ft. Collins* decision. [[79]](#footnote-80)79 Third, the State asserted Golden's appropriation was unreasonable, and could not meet the statutory definition of beneficial use at [*C.R.S. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [[80]](#footnote-81)80 Underlying all these arguments, however, and apparent in all the briefing, was the State's sentiment that the water Golden sought needed to be saved for other **[\*228]** consumptive uses. While this viewpoint was implicit in the State's arguments on appeal, [[81]](#footnote-82)81 it was explicit in many of the amici briefs, which claimed recreational appropriations would "deprive the citizens of the state of ***Colorado*** of their right . . . to divert unappropriated water," [[82]](#footnote-83)82 and would impact "the ability of water users in ***Colorado*** to develop waters of the state." [[83]](#footnote-84)83 Since any existing water right (absolute or conditional) would already be senior to the Golden course, the argument was that Golden's current beneficial use should be curtailed to save water for future, undefined uses, which these entities believed were more important.

On its instream flow argument, the State referenced legislative history related to the State's instream flow program, emphasizing its concern about appropriations of water not based on out-of-channel diversion and control of the water. In particular, it argued the enactment of Senate Bill 212 in 1987, which established the CWCB's exclusive authority to appropriate instream flows, was a legislative repudiation of the *Ft*. Collins decision, and barred Golden's in-channel diversion water right. [[84]](#footnote-85)84 After SB 212, the State argued, in-channel recreation rights could not be claimed by any entity other than the CWCB, and the only recreation right that could be claimed by entities other than the CWCB was for water that was physically diverted out-of-channel or stored in an on-channel reservoir. [[85]](#footnote-86)85

To support its argument that the Golden structures did not "divert" the amount of water claimed, the State emphasized the difference between the dam and notch at issue in *Ft. Collins* and the different kind of control over the water exhibited by the diversion structures in the Golden boating park. [[86]](#footnote-87)86 The Golden structures, the State asserted, merely created whitewater features, whereas the notch in the dam in Fort Collins had impounded water and then allowed safe boat passage. [[87]](#footnote-88)87 The State argued that the *Ft. Collins* decision presented a limited exception to what the State asserted was a strict requirement in ***Colorado*** law that water right could only be created for water diverted **[\*229]** out-of-channel, and urged the Supreme Court to narrowly limit the holding in *Ft. Collins* to the facts of that case. [[88]](#footnote-89)88 Moreover, the State argued that the Golden structures exhibited the requisite control only at a 30 cfs low-flow level, the flow rate at which water was contained within a low-flow conveyance notch in the structures. If Golden's right was allowed at all, "the water court should have granted a maximum right of 30 cfs." [[89]](#footnote-90)89 In the alternative, the State argued that at the very most, the claim must be limited to 200 cfs, the flow rate at which the structures began to create white water features. [[90]](#footnote-91)90

Finally, the State argued Golden's appropriation was not a reasonable use of water and that either the 30 cfs at which a low flow conveyance channel is created or the 200 cfs at which whitewater features are created would better meet the statutory definition of "beneficial use." [[91]](#footnote-92)91 The State maintained that the decreed appropriation constituted "virtually the entire hydrograph and all of the water produced in the upper Clear Creek basin." [[92]](#footnote-93)92 Thus, the court should have established a "duty of water" for recreational boating that would limit appropriations to a boat passage flow, not the amount necessary to meet the appropriator's intended experience.

C. GOLDEN'S RESPONSE

Responding to the State's arguments, Golden emphasized the water court's findings respecting Golden's intent to build a world-class whitewater course, that the course was designed to operate at the decreed flow rate of 1000 cfs, that the course structures controlled water and created desired whitewater features at this rate of flow, and that this amount of water is available for appropriation. [[93]](#footnote-94)93 Golden emphasized it was merely exercising its constitutional right to appropriate the waters of the state for beneficial use and that it was doing so fully within the requirements of ***Colorado*** water law. [[94]](#footnote-95)94 Golden argued its inchannel structures met all statutory and case-law requirements of a **[\*230]** diversion, and that the test of control established in the *Ft. Collins* decision had been met. [[95]](#footnote-96)95

Responding to State arguments concerning the relevance of SB 212, which gave the CWCB exclusive authority to appropriate instream flows, Golden pointed out it was not seeking an instream flow right. It noted Fort Collins had originally filed for an instream flow right but had amended its application to claim an appropriation based on diversion at dams that controlled water for beneficial use. [[96]](#footnote-97)96

Regarding beneficial use and reasonableness, Golden pointed to the clear evidence of the economic benefits of the course to the City and the undisputed evidence linking the extent of flows to the extent of use. [[97]](#footnote-98)97 Golden intended to build an elite course, one that would attract boaters from not only the entire Front Range of ***Colorado*** but nationally and even internationally for special events. Viewed from this perspective, the claimed level of flows was reasonable.

Golden also argued the claimed flows were reasonable in the context of Clear Creek, its hydrology, and the existing pattern of water uses. [[98]](#footnote-99)98 Not only were claimed flows physically available, Golden's analysis determined that virtually all this water would be flowing downstream to meet senior rights anyway. Golden highlighted the trial court finding that in dry years, 100% of the water would be subject to downstream senior calls. [[99]](#footnote-100)99 Golden also noted the stipulations it had entered with all actual water users. [[100]](#footnote-101)100

Golden argued the fallacy of the State's diversion and control argument was demonstrated by the fact that it would have been overcome if Golden had simply constructed a parallel kayak course channel next to the stream, and then diverted up to 1000 cfs of the ***river*** into that channel. [[101]](#footnote-102)101 Although that approach would be wasteful in terms of land use and finances, and would unnecessarily degrade the environment, it would have completely addressed the State's control argument. Rather than go to such unnecessary extremes, Golden followed the express language of [*C.R.S. section 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), and the *Ft. Collins* decision, and built the structures in the channel. In turn, those dams controlled the water in a manner that created one of the best kayak courses in the country, all without de-watering the stream or harming the environment.

**[\*231]** Finally, Golden noted the passage of SB 216 rendered moot the State's various policy-based arguments. [[102]](#footnote-103)102 Golden argued that the Court should not consider the far-flung scenarios regarding future kayak courses at unknown locations and with unknown circumstances that were raised by the State and its supporting amici. [[103]](#footnote-104)103 The General Assembly had already considered the same scenarios and policy arguments when it passed SB 216. With that bill, the General Assembly acknowledged the validity of RICD water rights while imposing some additional factors for the water court to consider, as well as creating an advisory role for the CWCB. So, while Golden and the other three applications pending at the time of SB 216 were exempted from the legislation, the legislature had already taken up the issue, considered the policy questions, and provided guidance for all future claims. There was no need for the Supreme Court to second-guess what the legislature had just done with SB 216.

D. ORAL ARGUMENT BEFORE THE SUPREME COURT

The case was argued on October 2, 2002. The Supreme Court was standing-room-only, and even the standing room was fully occupied along both walls of the spectator section. More than 200 people somehow managed to find seats. Arrayed in the front row were the State's top water officials, including the executive director of the ***Colorado*** Department of Natural Resources, the State Engineer, and the director of the CWCB. For Golden, most of the City Council was present, as were representatives of the Northwest Council of Governments, many other ***Colorado*** cities and towns, Trout Unlimited, and representatives of the recreation and environmental communities.

Golden's presentation began with the observation that the underlying premise of the State's appeal was that recreation is a lesser form of water use and that limits should be placed on recreation water uses that are not placed on other types of water uses. Golden noted that the water court had rejected that premise, and urged the Supreme Court to do the same. Golden's basic argument was that recreation is an acknowledged beneficial use of water under ***Colorado*** water law, and that there was no basis for treating this beneficial use any differently than any other type of water right appropriation. It urged the court to explicitly acknowledge that recreation is a use of water coequal with any other beneficial use.

Golden argued its water right met the same requirements as any other water right: diversion pursuant to statute, beneficial use at **[\*232]** amounts claimed, and amounts claimed are reasonable. It repeated again the weight of supporting evidence for each of these elements at trial and affirmed by the water court in its decision. It urged the court to reject the State's attempt to assert authority not found in law to reduce appropriations for the benefit of undetermined future appropriations.

Golden pointed to the demonstrated economic benefits generated by the use, by the wide range of users who enjoy the whitewater course, by the use of the course for elite competitions, by the widespread recognition of the course as one of the best in the country, and by the water court's finding that there was no waste associated with the use. Golden emphasized the importance of considering the appropriator's intent when evaluating reasonableness, and pointed to the City's welldocumented desire to have a world-class facility.

Golden then turned to the matter of diversion and control and pointed out previous Supreme Court decisions rejecting the State's theory that water must be diverted out of the channel. Golden noted the abundant evidence at trial establishing the highly engineered nature of the structures, their design to work best at 1000 cfs, and their effectiveness at creating features that produced the desired recreation experience. The best evidence of all, Golden argued, was the thousands of documented users who had been coming to the course with their boats and the many others who had been watching and enjoying these uses. Crowds of people don't come to a ***river*** to watch it flow in its normal channel.

To counter the State's claim that Golden should be limited to the minimum amount to float a boat, Golden pointed out that people do not come to ***Colorado*** to ski our minimum slopes, to climb our minimum-sized mountains, or to experience the State's minimum beauty. Cities are not limited to irrigating minimum-size parks or lawns, and farmers are not restricted to growing the least-consuming crops. Likewise, Golden did not build a minimum whitewater course, nor was it required to. ***Colorado*** water law encourages users to be efficient, but efficiency is framed by the context of the desired beneficial use. ***Colorado*** leaves the matter of that use to the appropriator to determine, not state agencies.

On March 14, 2003, the Clerk of the Supreme Court notified the parties that the Justices had determined not to reach a decision until after they heard oral arguments in the State's appeal of water right decrees issued by the District Court for Water Division No. 5 for the boating parks in Vail and Breckenridge.

**V. EXTENDING THE RECREATION WATER RIGHT: VAIL AND BRE CKENRIDGE**

As the Golden case progressed, other ***Colorado*** towns and cities explored the possibility of claiming water rights for their ***river*** **[\*233]** improvements. They saw the opportunity to help diversify and strengthen their economies while providing an increasingly popular amenity for their citizens. After Golden, the next communities to commit to securing water rights for their whitewater parks were the mountain towns of Vail and Breckenridge. [[104]](#footnote-105)104

A. THE VAIL WHITEWATER PARK AND WATER COURT APPLICATION (WATER DIVISION 5, CASE No. 00CW259)

Vail is a world-famous ski destination that has increasingly sought ways to attract visitors year round. Among its many natural amenities is Gore Creek as it moves through the heart of the town. Vail's local boating community and its tourism board made a presentation to Vail's Town Council about the importance of kayaking to the state's economy and asked the Town to consider building a whitewater park. After further study, the Council voted to construct a whitewater park within the channel in the heart of Vail's Gore Creek Promenade pedestrian area. In its first summer of operation, the park hosted the Teva Whitewater Festival, which was broadcast nationwide on Fox Sports Net and brought thousands of visitors to Vail during the spring season.

On December 26, 2000, the municipal water provider for Vail, the Eagle ***River*** Water 8c Sanitation District ("District"), filed an application for conditional water rights for the Town of Vail Whitewater Park. [[105]](#footnote-106)105 By Memorandum of Understanding dated November 16, 2000, the Town of Vail and the District had agreed to the manner in which the proposed whitewater park would be operated in relation to area municipal and snowmaking water rights, and the District agreed to adjudicate and own the water rights for the boating park. [[106]](#footnote-107)106 As beneficial uses, the District identified boating (including kayaking, rafting and canoeing), piscatorial, and general recreational uses. [[107]](#footnote-108)107 Objections were filed by the CWCB, the State and Division Engineers, the Northern ***Colorado*** Water Conservancy District, and the Cities of ***Colorado*** Springs and Aurora through the Homestake Project. [[108]](#footnote-109)108 Trout Unlimited filed a **[\*234]** supporting statement so that it would have standing to participate in the case. [[109]](#footnote-110)109

B. TOWN OF BRECKENRIDGE WHITEWATER PARK AND WATER COURT APPLICATION (WATER DIVISION 5, CASE NO. 00CW281)

Breckenridge existed originally as a mining town, but its modern economy is heavily based on skiing in the winter and tourism in the summer. Situated along the Blue ***River*** above Dillon Reservoir, Breckenridge has invested heavily in restoring and improving the ***river*** to clean up old mining wastes and restore a more natural channel with improved habitat for fish. In the process, it constructed trails along the ***river*** for hiking and biking. It saw the addition of a boating park as another way it could increase the value of the ***river*** to the community and attract additional visitors during the non-ski season. The idea for the boating park originated with the Town's Open Space Committee. The Breckenridge Town Council subsequently authorized construction of a park with fifteen structures that extend approximately 1800 feet down the ***river***. [[110]](#footnote-111)110 The structures were designed for optimal performance at flows of 500 cfs. [[111]](#footnote-112)111

On December 28, 2000, the Town of Breckenridge filed an application seeking conditional water rights to protect the flows for which the structures had been designed and built. [[112]](#footnote-113)112 The application provided for the diversion of water of the Blue ***River*** at fifteen dam and water deflector structures for use by kayaks, canoes, rafts, and other forms of recreational boating and floating. [[113]](#footnote-114)113 Claimed beneficial uses for the whitewater park included all forms of boating and floating, piscatorial, and general recreational uses. [[114]](#footnote-115)114 Objections were filed by the CWCB, the State and Division Engineers, and the Homestake Project. [[115]](#footnote-116)115 Again, Trout Unlimited filed a supporting statement so that it would have standing to participate in the case. [[116]](#footnote-117)116

C. WATER COURT PROCEEDINGS

With both the Vail and Breckenridge cases filed in Water Division 5 and involving many of the same parties, Judge Thomas W. Ossola agreed to a case management order in June, 2001, under which the **[\*235]** trials in the two cases would be held consecutively, beginning with the Vail case. [[117]](#footnote-118)117 Trials were scheduled for May, 2002. [[118]](#footnote-119)118

The State filed a motion for summary judgment in both cases, asserting the same arguments it was pressing in the Golden appeal that a recreation right could only be decreed as a beneficial use for water that was impounded at a dam. [[119]](#footnote-120)119 The State also filed a motion in limine asking the Court to exclude any reference to the stipulated decree that the CWCB had consented to for the in-channel diversion water right sought by Littleton for boating structures on the South Platte ***River***. [[120]](#footnote-121)120

The Northern District filed a motion for summary judgment in the Vail case arguing that the District, as a water and sanitation district organized under the ***Colorado*** Special District Act, did not have statutory authority to hold a water right for recreation purposes. [[121]](#footnote-122)121 The Northern District further argued that *Ft. Collins* allowed only a "boat passage" recreation right, and that the Vail claim, if allowed at all, could not be decreed for more than the 30 cfs required to pass a kayak through the boating park. [[122]](#footnote-123)122 Judge Ossola denied all of the foregoing motions, and both the Vail and Breckenridge cases proceeded to trial. [[123]](#footnote-124)123

The parties submitted trial briefs generally tracking the arguments that had been made in the Golden case. Town officials from Vail and Breckenridge explained the importance of their respective boating parks to the communities. Kayakers and local business owners offered supporting testimony. Dr. Danielson, the former State Engineer, once again offered important expert testimony supporting the claimed recreation water rights and generally rebutting the State assertions.

**[\*236]** For its part, the State continued to assert that the claims were impermissible instream flows, that the boating park structures could not constitute diversion structures sufficient to sustain an appropriative water right, and, in the alternative, if such rights were allowed at all, that the water court must impose a "duty of water" to limit the size of the rights.

D. THE WATER COURT DECISIONS

The District Court Judge for Water Division 5 awarded decrees for the claimed flow rates for both boating parks, up to 400 cfs for Vail [[124]](#footnote-125)124 and 500 cfs for Breckenridge between the hours of 6:00 a.m. to 8:00 p.m. [[125]](#footnote-126)125 Moreover, the court specifically found that the District had the authority needed to apply for--and hold--recreational water rights for customers within its service area. [[126]](#footnote-127)126 The court only denied piscatorial uses as an independent basis for the claimed water rights. [[127]](#footnote-128)127 In granting the recreational water rights, Judge Ossola entered decrees which contained many of the same factual findings and determinations reached by Judge Hays in the Golden case. The State immediately filed appeals to the ***Colorado*** Supreme Court in both cases.

E. THE VAIL AND BRECKENRIDGE APPEALS

The briefing generally tracked the same arguments made in the Golden case. Among other issues, the State argued that prior to enactment of SB 216 there was no authority to allow any party other than the CWCB to appropriate RICDs. Vail concluded its argument with the statement: "People do not travel to Vail to kayak the Park for its minimum water."

F. ORAL ARGUMENT BEFORE THE ***COLORADO*** SUPREME COURT

The ***Colorado*** Supreme Court set oral argument for both cases for May 3, 2003. While the Golden case had already been argued, it was clear the court was considering all three cases together.

Counsel for Vail and Breckenridge began by noting the court was considering two more decisions by a different water judge that fully upheld claims for recreational in-channel water rights as a matter of basic ***Colorado*** water law, just as the judge had in the Golden case. Counsel recounted why these decisions had been made, and why they should be upheld. Beginning with the issue of diversion, he pointed out that under both the ***Colorado*** statutory definition of diversion and **[\*237]** the interpretation of this provision in the *Ft. Collins* decision, inchannel diversions exist where (1) a structure (2) functions as designed (3) to control water for beneficial use. With respect to the reasonableness of the claims, counsel noted that, after lengthy trials, two different water court judges in three cases held the amounts claimed to be reasonable within the factual context of each case. Reasonableness must be evaluated in the context of the appropriators' intent to develop the best possible boating park, and the amount of water appropriated was in fact the minimum necessary for the intended purpose. Moreover, the evidence of the direct correlation between flow and use was unrebutted. Next, counsel argued the passage of SB 216 had undercut the entire basis for the State's appeals. The bill clearly confirmed the legitimacy of recreational in-channel diversions.

Vail and Breckenridge returned to what they termed the "essence" of the State's opposition: that recreation is a lesser form of water right that should be entitled to a lesser amount of water. The State sought to limit recreation to some minimum experience, without regard for the intentions of the appropriator. In fact, towns like Vail and Breckenridge provide a world-class recreational experience for skiing, a quality experience essential to their economies. Recreation represents the economic future for resort communities in ***Colorado***, and increasingly the entire State. Whitewater parks bring people to ***Colorado*** in times when tourism is otherwise low. People come looking for the best possible boating experience. Higher flows enhance the experience and bring more users. As summarized by counsel for Vail and Breckenridge, "the greater the flow, the greater the dough, for the State as a whole."

The towns went on to argue that the non-consumptive, in-channel appropriations represented the ultimate in achieving maximum utilization of the State's waters. For the most part, such appropriations simply add another use to water that is already moving to senior uses downstream. It adds a new nonconsumptive use that is already claimed downstream or must be delivered under ***Colorado***'s compact delivery obligations. New appropriations always have the effect of limiting what others may do in the future. Such is the nature of the prior appropriation doctrine. But the test of value has always been the willingness of the user to invest the time and money necessary to put water to beneficial use. Here, three public entities had made considerable investments to appropriate and use water in furtherance of their citizens' economic and social well being.

**[\*238]** **VI. THE SUPREME COURT DECISION IN GOLDEN, BRECKENRIDGE, AND VAIL**

With Justice Hobbs not participating, the ***Colorado*** Supreme Court deadlocked 3-3 on whether to affirm the decisions of the two water courts in the three different cases. [[128]](#footnote-129)128 The effect of an equally divided court is to affirm the lower court decisions by operation of law, pursuant to [***Colorado*** *Appellate Rule 35(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:63CY-K1R1-DYDC-J4DT-00000-00&context=1516831). [[129]](#footnote-130)129 Thus, the decision of the Water Court for Water Division No. 1 became final, as did the decisions in Water Division No. 5. The Golden, Vail, and Breckenridge boating parks were protected with decreed water rights, and the Denver and local newspapers heralded this as a victory for recreation water with front page banner headlines. [[130]](#footnote-131)130 The next round of legal battles would be fought under the terms established in SB 216.

**VII. THE CWCB'S RICD RULES UNDER SB 216**

Allegedly in conformity with the mandate of SB 216, the CWCB adopted Recreational In-Channel Diversion Rules on November 8, 2001. [[131]](#footnote-132)131 The rules require the applicant to submit a copy of its water court application to the Board within thirty days after filing. [[132]](#footnote-133)132 The rules listed a total of twenty-five findings the Board may make in its consideration of the five statutory factors. [[133]](#footnote-134)133 By way of introduction to this list of findings, the rules stated:

If the Board determines that the amount of water sought for a RICD does not represent the stream flow necessary to provide a reasonable recreation experience in and on the water and/or that the RICD does not divert, capture, and control water in its natural course or location with physical control structures, then the Board shall note that determination in its written recommendation to the water court and specifically preserve the Board's authority to argue these issues in water court. [[134]](#footnote-135)134

**[\*239]** In addition, the rules identified twelve types of information the applicant should provide to assist the Board in its evaluation. [[135]](#footnote-136)135

In 2003, the Board adopted the "Recreational In-Channel Diversion ('RICD') Policy Regarding Technical Criteria." [[136]](#footnote-137)136 It referred to the criteria as a set of "minimum guidelines to evaluate whether an RICD should be granted and under what conditions the CWCB should recommend approval of an RICD." [[137]](#footnote-138)137 The CWCB suggested applicants should follow the criteria for determining a "reasonable flow rate for a recreational course design that utilizes stream flow in the most efficient manner possible." [[138]](#footnote-139)138 The guidance "recommends" a flow rate in the range of 50 to 350 cfs without regard for the size of a ***river*** or stream. [[139]](#footnote-140)139 It suggests a flow rate that exceeds the fortieth percentile flow during the intended time period (that is, a flow at the structure that would be equaled or exceeded sixty percent of the time) would be *per se* "unreasonable." [[140]](#footnote-141)140

In short, the rules were an effort to accomplish administratively what the CWCB was unable to do through the legislative process or in court--undermine RICDs and at the same time, make the administrative process so cumbersome and expensive that local communities would be deterred from even trying to appropriate such rights.

**VIII. SORTING OUT THE PROCESS: THE SUPREME COURT DECISION IN THE *GUNNISON* CASE**

In 2002, the Upper Gunnison ***River*** Water Conservancy District ("Upper Gunnison") filed an application for water rights for the Gunnison ***River*** Whitewater Course, consisting of six separate structures to concentrate and control the flows of the Upper Gunnison ***River*** for beneficial use. [[141]](#footnote-142)141 The application sought conditional rights to use flows between May 1 and September 30 ranging from 270 cfs to 1500 cfs. [[142]](#footnote-143)142 Identified beneficial uses were boating (including but not limited to kayaking, rafting, and canoeing) and general recreational uses. The Upper Gunnison claim was the first significant RICD application filed **[\*240]** under SB 216 and submitted to the CWCB under it SB 216 agency rules.

The CWCB review process focused heavily on the flow rates that, in its view, would constitute the minimum necessary to provide a reasonable recreation experience. In contrast to the flows sought by the applicant, the CWCB staff recommended flows of 250 cfs for May, August, and September and 500 cfs for June and July. [[143]](#footnote-144)143 It based these recommendations on statements in the Upper Gunnison's expert's report that whitewater kayaking could occur at 250 cfs, as well as balance needs for future development with the applicant's interest in providing a reasonable recreation experience. [[144]](#footnote-145)144 Staff recommended that any call under the water right in June and July be regarded as "futile" if it would not produce the full 500 cfs. [[145]](#footnote-146)145 In its written findings and recommendations to the water court, the Board stated its view that the minimum stream flow necessary to provide a reasonable recreation experience was 250 cfs from May through September and zero cfs the rest of the year. [[146]](#footnote-147)146

Rejecting the CWCB position, the Division 4 Water Court granted the Upper Gunnison the conditional water rights requested. [[147]](#footnote-148)147 In its conclusions, the court acknowledged the presumption entitled to the adverse CWCB findings, but found that the Upper Gunnison had brought forth sufficient contrary evidence to overcome the presumptions. [[148]](#footnote-149)148 It noted the CWCB had not addressed the flow rates claimed by the applicant, and in that regard had not presented the findings of fact called for under SB 216. The court went on to state that it would not "second guess" the Upper Gunnison's requested amounts of water. [[149]](#footnote-150)149 The court granted the decree for conditional water rights for the course in substantially the amounts claimed. [[150]](#footnote-151)150

**[\*241]** The CWCB appealed to the ***Colorado*** Supreme Court. Among other matters, the State argued that under SB 216 the water court must uphold all presumptively valid CWCB findings unless rebutted by clear and convincing evidence. [[151]](#footnote-152)151 The State also asserted SB 216 directed the CWCB, not an applicant, to determine whether the amount claimed is the minimum stream flow necessary to serve an applicant's intended reasonable recreation experience. [[152]](#footnote-153)152

In addition to the six parties participating in the appeal, the case drew numerous amicus parties, twenty-four in total, again roughly evenly split between proponents and opponents of recreational water rights.

The ***Colorado*** Supreme Court held that both the CWCB and the water court failed in certain respects to follow the requirements of SB 216. [[153]](#footnote-154)153 The court rejected the CWCB assertion of "objective" authority to determine the appropriate minimum stream flow. [[154]](#footnote-155)154 The court directed the CWCB must review the application in the form submitted by the applicant: "As such, we hold that the General Assembly intended for the CWCB to function as a narrowly constrained fact-finding and advisory body when it reviews RICD applications, rather than in an unrestricted adjudicatory role."[[155]](#footnote-156)155 Because of the manner in which the CWCB conducted its review, the water court "received no guidance from the CWCB about how Applicant's plans might affect the five statutory factors under consideration." [[156]](#footnote-157)156 Finding confusion in the record respecting the actual findings and recommendations of the CWCB, the court concluded:

No matter which way one views the record, the CWCB's limitation of Applicant's claimed RICD to 250 cfs was in clear violation of the plain language of SB 216, which requires the Board to review the application strictly as submitted by the applicant, make the requisite statutory findings of fact, and formulate a recommendation to the water court. [[157]](#footnote-158)157

The ***Colorado*** Supreme Court upheld the Division 4 Water Court's handling of the presumptive effect of CWCB findings under SB 2162. [[158]](#footnote-159)158 The court specifically rejected the State's assertion that its findings could only be rebutted by clear and convincing evidence. In the words of the court: "By urging a higher standard such as clear and convincing **[\*242]** evidence or arbitrary and capricious review, the CWCB is fashioning for itself the role of an administrative adjudicatory agency or a quasijudicial body--a role which . . . was specifically rejected by the General Assembly." [[159]](#footnote-160)159

The court did note, however, that SB 216 puts in place a "minimum stream flow" standard for RICDs, and determined that the water court failed to independently determine that this requirement had been met:

In short, we hold that the starting point for the water court's analysis of a RICD application is the definition of a RICD provided by the General Assembly. Unless the application is limited to the minimum stream flow for a reasonable recreation experience in and on the water, it does not satisfy the beneficial use requirement, and the application cannot be granted. [[160]](#footnote-161)160

The court then went on to consider the meaning of the phrases "minimum stream flow" and "reasonable recreation experience." It defined minimum stream flow as "the least necessary stream flow to accomplish a given reasonable recreation experience. . . ." [[161]](#footnote-162)161 The court noted the reasonableness of a recreation experience varies according to the perspective of the appropriator. [[162]](#footnote-163)162 In its search for other guidance respecting a reasonable recreation experience, the court noted that what is reasonable depends on the particular circumstances at hand, particularly the availability of unappropriated water in the proposed reach of stream, as well as the needs of future upstream consumptive users. In the right circumstances, the court noted, a "worldclass" course claiming almost the entire flow of a stream could be "reasonable." [[163]](#footnote-164)163

In conclusion, the court directed water courts to first make an objective determination concerning whether the application is for a reasonable recreation experience and then to determine the minimum amount of stream flow necessary to accomplish that purpose. [[164]](#footnote-165)164 The water court must then "carefully evaluate" the five statutory factors as they bear on the acceptability of the application before making its final determination. [[165]](#footnote-166)165

The *Gunnison* court ultimately held that RICDs are to be evaluated by water courts on a case-by-case basis. The court sifted this evaluation down to three fundamental elements that an applicant must prove **[\*243]** when seeking flows for a RICD. First, what was the recreation experience intended by the applicant? Second, is that recreation experience reasonable given the available flows and stream characteristics? Third, are the claimed flows the minimum amounts to achieve that recreation experience? Again, the ***Colorado*** Supreme Court in *Gunnison* specifically contemplated decrees providing sufficient flows to support a world-class course and a world-class recreation experience.

While the Supreme Court decision was a procedural setback for Upper Gunnison as it involved a remand, the decision was a clear substantive victory for recreation water rights. The State, on the other hand, was now 0-4 at both the trial court and Supreme Court level. After spending hundreds of thousands of dollars of taxpayer money on both sides, the State had yet to reduce a claimed RICD by a single cfs.

**IX. CITY OF STEAMBOAT SPRINGS BOATING PARK -- THE FIRST TRIAL AFTER *GUNNISON***

The first RICD case tried after the Supreme Court's discussion and analysis of SB 216 in the *Gunnison* decision was the claim by the City of Steamboat Springs for its boating park on the Yampa ***River***. The CWCB's vehement opposition to the Steamboat claim was unprecedented.

The Yampa ***River*** flows through the heart of the City of Steamboat Springs, and is one of the last ***rivers*** in the State that has not been overappropriated. It is an extraordinary recreational and aesthetic amenity of tremendous importance to the City. The idea for a boating park on the Yampa emerged out of the combined interests of citizens, City staff, commercial outfitters, and downtown businesses, and was formalized within a broader Yampa ***River*** Management plan that the City had been pursuing to preserve and protect the ***river*** corridor.

The City built two boating diversion structures, known as Charlie's Hole and D-Hole, in a reach of the ***river*** near the downtown area. In keeping with the image of its ski mountain, and the athletic heritage of a small town that counts more than eighty Olympians as its current or past residents, the City sought to build a facility that would draw boaters from around the state, the nation, and even internationally. It saw the boating park as an important attraction during the spring and summer months when there was no ski-related business. The concept was to build a facility that would attract the widest possible range of users with varying skill levels and boating interests. By the time of the RICD application, the two structures had already acquired a national reputation.

Given the high flows of the Yampa ***River***, Mr. Lacy designed the two Steamboat structures to operate at their optimal level at flows of over **[\*244]** 1700 cfs. [[166]](#footnote-167)166 The City claimed a RICD right that began with modest flow claims in April, climbed to a maximum claim of 1700 cfs during a twoweek period during the spring runoff, and then extended through the end of the summer with lesser amounts to preserve a tubing flow. [[167]](#footnote-168)167 After a high flow season, tubing on the Yampa is an extremely popular activity on the stretch of the ***river*** through the City.

While the CWCB had clearly been a consistent and zealous opponent of all the previous RICD water rights, it pulled out all the stops in its opposition to the Steamboat claim. The CWCB's strategy was clear--not only kill the Steamboat RICD, but at the same time make the litigation process as expensive as possible. The CWCB strategy was coordinated by the CWCB's "RICD Program Coordinator," who was a former ***Colorado*** Assistant Attorney General, and implemented by CWCB staff members and a team of three attorneys at the Attorney General's office that worked virtually full-time on the case for an extended period.

Work on the case began with preparations for the CWCB hearing on the five criteria required by SB 216. That hearing was held for two days in May 2004 before a packed house in a large conference room at the Steamboat Grand Hotel. After presentations by the city, the CWCB, and many of the parties that filed statements of opposition to the claim, as well as extensive periods of public comment, the CWCB recommended that the claim be denied. It issued its written recommendation in June of 2004. [[168]](#footnote-169)168 While satisfied with the compact, access, and instream flow protection factors required to be considered under SB 216, the CWCB recommended against the claim because, in the CWCB's opinion, the boating park was not in an appropriate stream reach (this despite the fact the reach was selected by a ***river*** management plan seven years in the making), and did not serve the concept of maximum utilization of ***Colorado***'s water resources. [[169]](#footnote-170)169

Following the CWCB hearing, but well in advance of trial, the City entered into extensive settlement negotiations with the objecting water users in the Yampa ***River*** basin. The City pursued those settlement negotiations to promote comity with its neighboring water users in the basin, but also to address the direction from the *Gunnison* decision that the reasonableness of any RICD claim would be judged, in part, by **[\*245]** whether it left room for upstream consumptive uses. [[170]](#footnote-171)170 Eventually, the city reached agreements with all of the other water users in the basin. The settlements reduced the city's high flow claim of 1700 cfs down to 1400 cfs, and contained other terms and conditions to protect the existing and future water needs of upstream water users. Despite the objection of the CWCB to these settlements, they were approved by the Water Court. [[171]](#footnote-172)171 Thereafter, only the State Engineer and the CWCB continued to oppose Steamboat Springs, and they forced the case to trial.

In response to the CWCB's continued strident opposition, the city put together a "dream team" of expert and lay witnesses, which included city officials; members of the City's recreation water advisory board; expert whitewater park designer Gary Lacy; many expert kayakers including three-time Olympian Scott Shipley, himself also a boating park designer; former ***Colorado*** State Engineer Jeris Danielson; well-known water resources engineer Gary Thompson; fisheries biologists; and economists. The CWCB took the deposition of all of these witnesses, and many other people. In all, the parties took more than twenty depositions.

The CWCB also perpetuated its opposition with a series of pre-trial motions. Among other objections, the CWCB argued in a pre-trial motion *in limine* that the water court should exclude all evidence concerning the economic value of the boating park to the City. [[172]](#footnote-173)172 In this manner, the CWCB attempted to keep the water court from hearing from the City's expert economist who put the value of the boating park to the City at approximately $ 7 million per year. The CWCB's motion was denied. [[173]](#footnote-174)173

The CWCB asked the court to dismiss the RICD claim and void all of the settlements that the City had reached with other water users on the grounds that the City violated a fiduciary duty it owed its citizens when it agreed to limit its RICD right in the settlements with other **[\*246]** water users. [[174]](#footnote-175)174 The court also denied this motion, and the case proceeded to a two-week trial. [[175]](#footnote-176)175

The State brought twelve stuffed binders of exhibits to the trial with over 600 exhibits. [[176]](#footnote-177)176 The court heard from all of the City's witnesses, despite the CWCB's motion to prevent former Olympic kayaker Scott Shipley from testifying. In the court's eventual oral ruling from the bench, Judge Michael O'Hara cited Mr. Shipley's testimony as particularly persuasive. [[177]](#footnote-178)177

The court also heard from the CWCB's "recreation experts" and considered the data they had collected regarding use at the boating park. The court heard extensive testimony from the CWCB's expert on whitewater park design, who argued that more work and money should have been invested by the City in the design process for the boating park, and suggested that it might have been possible to design the structures to achieve the same boating experience at lower flow rates. At the close of trial, the court issued a rare and extensive ruling from the bench.

In that oral ruling, the court discussed the *Gunnison* decision and the five criteria required to be considered under SB 216. Again, the CWCB had already recommended in the City's favor on three of these issues. As for the two adverse CWCB recommendations, the court concluded that the City had overcome the presumptive weight accorded the recommendations on the appropriate stream reach and maximum utilization criteria. [[178]](#footnote-179)178 Concerning the CWCB's attempt to tell the City that the reach of the Yampa ***River*** it selected for the boating park was not appropriate, the court said the following: "The Court finds that there was evidence presented by the Applicant that this was not only the appropriate stream reach, but the only available stream reach for this use on the Yampa ***River*** within the municipal boundaries." [[179]](#footnote-180)179

With regard to the amount of money spent on the design process, the court held:

This Court emphatically rejects the implication that this application should be denied because the City did not spend enough money on this project or that expenditures of hundreds of thousands of dollars is de facto necessary to support such an application. I find that there **[\*247]** is absolutely nothing improper with the municipality seeking a world class facility at, to quote the State, WalMart prices. [[180]](#footnote-181)180

In conclusion, the court stated, "[t]his Court finds that the evidence presented by Applicant has proven by a preponderance of the evidence that Applicant is entitled to the decree sought." [[181]](#footnote-182)181

The final decree, signed March 13, 2006, confirmed absolute water rights for the City in the amounts requested for boating, kayaking, inner-tubing, rafting, and canoeing. [[182]](#footnote-183)182 The decree recognized the City's purpose in constructing the park was to "create a recreational amenity that would draw boaters and spectators to the region. Specifically, the Boating Park was built to generate greater tourist revenue outside the ski season by meeting the recreational boating and tubing demands of the City's citizens and visitors, and creating a venue for special events." [[183]](#footnote-184)183 The claimed flow amounts at the identified time intervals were found to "meet these reasonable objectives." [[184]](#footnote-185)184

The decree specifically addressed each of the five statutory criteria set forth in SB 216, finding in all cases that the evidence supported the City's application, [[185]](#footnote-186)185 and that substantial unappropriated water remained for future upstream development, including exchanges. [[186]](#footnote-187)186

In summary, despite its vigorous opposition that included numerous motions, objections, depositions, the ordeal of a two day administrative hearing and a two week trial, Judge O'Hara ruled from the bench the State failed to reduce the City's claim by a single drop of water. It was such a devastating loss that it paved the way for the ascendance of more reasonable voices within the CWCB and a narrow majority vote not to appeal.

**X. THE CWCB RESPONSE TO THE *GUNNISON* DECISION: NEW RICD RULEMAKING**

In response to the *Gunnison* decision, the CWCB initiated a rulemaking process in the summer of 2005 to revise its existing RICD rules. Remarkably, the new rules imposed a far greater burden on the applicant than the previous rules. The statute only requires the applicant to provide a copy of its water court application to the CWCB. [[187]](#footnote-188)187 Yet, the new CWCB agency rules broke the five statutory review factors into forty-five "sub-factors" for Board consideration, and required applicants **[\*248]** to provide all information necessary for an extensive CWCB evaluation on most of these forty-five sub-factors. [[188]](#footnote-189)188

For example, the effect of an application on ***Colorado***'s ability to develop its compact entitlements was given ten sub-elements. [[189]](#footnote-190)189 These elements went well beyond a finding of direct impairment (i.e., because of this appropriation, ***Colorado*** will be unable to develop its compact entitlement) to a review of any and all potential uses of water in a given basin, and whether such uses might be impaired by the application. Thus, under the rules the CWCB is to consider "exchange opportunities...that may be adversely impacted....," the effect on "reasonably foreseeable uses," whether the application "shields water from consumptive use" otherwise available, and whether consumptive use "opportunities" upstream would be impaired. [[190]](#footnote-191)190

All appropriations of water necessarily have such effects under a priority system. The very purpose of a prior appropriation water right is to preserve a claim to a particular portion of water as against the effects of subsequent appropriations. These "considerations" clearly go well beyond the statutory charge given to the CWCB and reflected the CWCB's intention to evaluate potential other future uses of the water claimed by the RICD, rather than determine compact impairment.

The CWCB rules similarly expanded the other statutory review criteria into multiple requirements. The "maximum utilization" factor, for instance, was divided into *twenty* subparts, and the rules required applicants to submit information on each one. [[191]](#footnote-192)191

In the *Gunnison* case, the ***Colorado*** Supreme Court explicitly admonished the CWCB for substituting its judgment about the flow rate proposed by the applicant. [[192]](#footnote-193)192 Nevertheless, the new rules once again called for the board to consider the appropriateness of the claimed flow rate, both in the context of maximum utilization and whether the amount claimed is the "minimum." [[193]](#footnote-194)193 As further described in the "Statement of Basis and Purpose" accompanying the rules, the Board's purpose was to enable it to address "the ultimate policy question" of how much water is needed, "to determine where in the middle of the spectrum the RICD claim should be to constitute the minimum stream **[\*249]** flow for a reasonable recreation experience." [[194]](#footnote-195)194 Yet, the ***Colorado*** Supreme Court had just rejected the CWCB's assertion that SB 216 had given the Board "the authority to objectively determine what stream flow is minimally necessary in order to provide a reasonable recreation experience." [[195]](#footnote-196)195 Again, the court held:

After a careful analysis of the plain language of SB 216 as a whole, as well as noting the legislative history, we hold that 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. [[196]](#footnote-197)196

***Colorado*** often is referred to as a "pure" prior appropriation state. [[197]](#footnote-198)197 That reference reflects the state's long-standing policy of allowing the would-be user of water to establish its claim to public water, subject only to court ratification that the appropriation meets certain statutory requirements, rather than the administrative allocation system using permits followed by most prior appropriation states. [[198]](#footnote-199)198 Without doubt, the ***Colorado*** General Assembly modified this traditional policy in the case of RICDs by providing for a partial, fact-finding review by the CWCB prior to water court determination. But that modification, as the ***Colorado*** Supreme Court found in the *Gunnison* case, was a limited one--making the CWCB a "narrowly constrained fact-finding and advisory body ...." [[199]](#footnote-200)199 The nature of the review called for by the CWCB rules went far beyond the CWCB's statutorily-directed role.

Adoption of these rules represented an astonishing action by a board that had just been reprimanded by the ***Colorado*** Supreme Court for exercising authority not provided in SB 216. Apparently, the CWCB failed to read the *Gunnison* decision or blatantly chose to ignore it. But to those involved in this controversy, this action was entirely consistent with the CWCB's behavior in its publicly-funded campaign against recreation water rights." [[200]](#footnote-201)200

**[\*250]** **XI. SENATE BILL 62**

After the filing of the Steamboat Springs application, but prior to the trial in that case, Senator Taylor introduced SB 62 in the 2005 ***Colorado*** General Assembly. [[201]](#footnote-202)201 This was an outright effort by Senator Taylor, Yampa Basin lawyer Tom Sharp, and the Upper Yampa Water Conservancy District to undercut and legislatively defeat the Steamboat RICD. It attempted to do this by adding as a factor for CWCB review whether the RICD would "affect" development of future upstream storage and water development projects. [[202]](#footnote-203)202 The bill also declared water diverted by a RICD to be wasted unless at least ten kayakers were using the water at or near the structures. [[203]](#footnote-204)203 It would have restricted the ability of the RICD to place a call unless the structure controls 100% of the water, and concentration of flow would not constitute control of water. [[204]](#footnote-205)204 Finally, it would have limited in-channel recreation to kayaking only. [[205]](#footnote-206)205 A subsequent amendment would have restricted flow rates for RICDs to no more than 350 cfs. [[206]](#footnote-207)206

Because the bill would have effectively undermined future water rights for boating parks, the recreation community believed the only option was its defeat, not its amendment. This opposition continued, even when the bill was amended to exclude all existing applications and decrees for RICDs. With the support of most traditional water interests, the bill passed out of the Senate and through the House Agriculture Committee. However, as the result of an intensive lobbying **[\*251]** campaign by a coalition of recreation water interests, [[207]](#footnote-208)207 the bill was finally killed on the House floor. [[208]](#footnote-209)208

**XII. THE CHAFFEE COUNTY CLAIM (WATER DIVISION 2, CASE NO. 04047129)**

The Upper Arkansas ***River*** in Chaffee County has become one of the nation's premier locations for water-based recreation. [[209]](#footnote-210)209 Commercial ***river*** use alone had an estimated economic impact of $ 64.7 million on the Arkansas ***River*** in the year 2006. [[210]](#footnote-211)210 The Arkansas ***River*** in Chaffee County is not only a major center for commercial boating, it is also widely used for private boating and recreational fishing. Chaffee County also hosts the longest running boating event in the country (Fibark boating festival) that draws large crowds to the City of Salida every year.

The boating parks built in the City of Salida and Town of Buena Vista provide a high quality recreation experience for a variety of different types of boats and users. The rationale for obtaining water rights for the boating parks was the same as for every community--to protect flows at the boating parks and, in the process, help protect the local economy. The boating parks are a significant component of the economic value of the Arkansas ***River*** in Chaffee County. Government officials were concerned that the pressure on the upper Arkansas ***River*** to provide water supplies for various users, including Front Range municipalities, that had been experienced over the past thirty years would continue to grow in the future, leaving the boating parks vulnerable to future water supply projects. In essence, the RICD application was an effort to help protect Chaffee County's local economy.

Prior to filing for recreational water rights, Chaffee County officials met with the recreational boating community, local business leaders, and even the major water users on the Arkansas ***River*** that would later become the objectors. After conducting a hearing on the matter, Chaffee County filed an application for water rights for the two parks **[\*252]** on December 30, 2004. [[211]](#footnote-212)211 Statements of opposition were filed by seventeen parties. [[212]](#footnote-213)212 Some of the more active objectors in the case included trans-mountain diverters such as the Cities of ***Colorado*** Springs and Aurora; in-basin water users such as Pueblo Board of Water Works, Southeastern ***Colorado*** Water Conservancy District ("SEWCD") and Upper Arkansas Water Conservancy District; and State agencies such as the CWCB, ***Colorado*** Department of Natural Resources ("CDNR") and the State and Division Engineers.

The CWCB held its administrative review hearing under SB 216 in May 2005, despite requests by many parties to postpone the hearing to allow further settlement discussions that had started before the application was even filed. [[213]](#footnote-214)213 At the hearing held in Salida, many citizens showed up and voiced their support for the application. In fact, not one public comment was made against the claim. After the hearing, the CWCB postponed making its recommendations to allow the parties time to continue settlement negotiations.

The Arkansas ***River*** is a highly managed, intensively used source of water that, in addition to being the focal point for the local, recreational-based economy, provides water for both agriculture and municipalities in the upper basin, the Front Range, and the eastern plains of ***Colorado***. Although existing in-basin and trans-basin uses limit opportunities for new uses of water on the Arkansas ***River***, the potential for large exchanges of existing water rights to points upstream of the boating parks clearly existed. [[214]](#footnote-215)214 The biggest challenge for Chaffee County was to shape a water right that would protect its interests in the boating parks against future exchanges and protect its local economy associated with these parks, at the same time recognizing the desire of other communities and water users to have flexibility in developing their future water supplies.

**[\*253]** Chaffee County ultimately negotiated a settlement with all of the water users. The resulting compromise is a multi-tiered water right that includes the largest recreational water rights in ***Colorado***. The water rights for both parks are measured at a gage just downstream of Salida, and consist of: (1) 1800 cfs for up to eight event days in June; (2) 1400 cfs for up to thirty consecutive days picked each year from the Friday before Memorial Day to the end of June ("30-Day Period"), except for event days during that time; (3) 700 cfs from July 1 through August 15, and any time between the Friday before Memorial Day and the end of June that is not part of the 30-Day Period; and (4) 250 cfs from March 15 to the Thursday before Memorial Day, and from August 16 to November 15. [[215]](#footnote-216)215

Various objectors asserted they reasonably anticipated filing for exchanges upstream of the boating parks in the near future. These exchanges totaled approximately 140,000 acre-feet and are junior to the boating park water rights. [[216]](#footnote-217)216 As part of the settlement, however, Chaffee County agreed that so long as certain conditions were met, it would reduce its call during the 30-Day Period (but not event days) from 1400 cfs to as low as 1200 cfs, to the extent its water rights prevented these future exchanges. [[217]](#footnote-218)217 This 200 cfs reduction--roughly 12,000 acre-feet if over the entire 30-Day Period--is available to any user in priority. In addition, under certain very limited conditions, where some water users are seeking to replace storage levels reduced by drought conditions, Chaffee County agreed to reduce its call on event days to as low as 1500 cfs, and during the 30-Day Period to as low as 1100 cfs on weekends and 1000 cfs on weekdays. [[218]](#footnote-219)218

Negotiations in the case were complicated by the Upper Arkansas Voluntary Flow Management Program ("VFMP"), a year-to-year, voluntary flow management program whereby the Bureau of Reclamation, in concurrence with the SEWCD and CDNR, operates upstream reservoir releases, primarily involving trans-mountain water, so as to manage flows in the Arkansas ***River*** above Pueblo Reservoir for recreation and fishery purposes. [[219]](#footnote-220)219 Although the boating park water rights are distinct from the VFMP, some parties were concerned that opposition to the boating park water rights would jeopardize this voluntary agreement. To help ensure consistency between the VFMP and the water rights, Chaffee County agreed to use the same ***river*** gage used in the VFMP to administer both boating park water rights. Chaffee County further tailored portions of its water rights to be consistent with the target flow levels of the VFMP. This included 700 cfs from July 1 to August 15, **[\*254]** and 250 cfs on the shoulder seasons. These recreational water rights work in tandem with the VFMP by protecting the native flows that the program is designed to supplement. In short, although Chaffee County cannot call for storage releases under the VFMP to satisfy its water rights, it can prevent junior water rights from diminishing ***river*** flows below these targets.

With the assistance of SEWCD, CDNR, Trout Unlimited, Arkansas ***River*** Outfitters Association and others, negotiations in the Chaffee County case resulted in a five-year VFMP agreement that provides more certainty for local outfitters and businesses. As part of the larger settlement agreement, there was also a greater commitment obtained from water users to exercise water rights in a manner consistent with the VFMP and commitments from some parties on limitations with respect to water rights that would otherwise be senior to the RICDs.

The CWCB re-convened its hearing in March, 2006, during which it heard evidence on the settlement agreements that, although not signed, had largely been approved in concept. [[220]](#footnote-221)220 Based on these negotiated agreements, the CWCB had little choice but to recommend approval of the application. Thereafter, the settlements were finalized and a final decree issued without a trial. [[221]](#footnote-222)221

**XIII. THE GENERAL ASSEMBLY WEIGHS IN AGAIN: SENATE BILL 37**

The defeat of SB 62 and questions raised in the *Gunnison* decision prompted the 2005 ***Colorado*** General Assembly to ask the Water Resources Review Committee, a standing committee of senators and representatives that consider water matters for possible legislative action, to hold hearings to determine the need for legislation addressing RICDs. [[222]](#footnote-223)222 The Committee held several hearings in the summer and early fall at which numerous parties testified. An initial draft was generated that prompted active review and comment. The outcome of this process was introduced in the 2006 General Assembly as SB 37. [[223]](#footnote-224)223 The bill's sponsors were the ***co***-chairs of the Committee (and also the chairs of the Senate and House Agriculture committees), Senator Isgar and Representative Curry.

One major change proposed by SB 37 was to reduce the CWCB's review role. To this end, the bill proposed removing the requirement that the CWCB hold a hearing, and replaced the hearing with a public **[\*255]** meeting. [[224]](#footnote-225)224 It also proposed eliminating from CWCB review the "appropriate stream reach and access factors" first established in SB 216, as well as the catchall "such other factors as may be deemed appropriate." [[225]](#footnote-226)225 While the CWCB was still required to provide written findings to the water court on the remaining three factors, it no longer would make recommendations. [[226]](#footnote-227)226 The water court was specifically directed to deny an application if it found the RICD would "materially impair the ability of ***Colorado*** to fully develop and place to consumptive beneficial use its compact entitlements. . .." [[227]](#footnote-228)227

To help address the concerns raised by the ***Colorado*** Supreme Court in the *Gunnison* decision respecting guidance to the water court in evaluating the reasonableness of the proposed RICD appropriation, the bill offered the following as factors for the water court to consider: (1) "the flow needed to accomplish the claimed recreational use"; (2) "benefits to the community"; (3) "the intent of the appropriator"; (4) "stream size and characteristics"; and (5) "total stream flow available at the control structures" at the time claimed. [[228]](#footnote-229)228

Two especially controversial provisions in the original bill precluded the State Engineer from administering a call for a RICD unless at least ninety percent of the decreed rate of flow was present, and required the water court to retain jurisdiction of a decreed RICD for at least twenty years. [[229]](#footnote-230)229

The original bill was significantly modified in both the Senate and the House. On the Senate side, the primary bill sponsor, Senator Isgar, attempted a number of amendments to limit the RICD right, and successfully reintroduced the word "minimum" into the definition of RICD. [[230]](#footnote-231)230 On the other hand, the call threshold was lowered to eighty-five percent, and it was clarified that this was the amount that had to be generated by a call for it not to be deemed futile. [[231]](#footnote-232)231

Perhaps the most significant change made in the House that was ultimately enacted into law was the incorporation of an alternative provision quantifying the claimed RICD appropriation volumetrically and comparing that volumetric amount to the total average historical volume of water that would have passed through the structures during the proposed days of use. [[232]](#footnote-233)232 If the volumetric quantity of the RICD does **[\*256]** not exceed fifty percent of the total average historical volume during the claimed period of use, then the amendment provided the eighty-five percent call threshold limitation would not apply. [[233]](#footnote-234)233

Moreover, the retained jurisdiction provision was stricken in the House and clarifying language was added to the applicability provision to ensure SB 37 would not apply to RICDs with decreed conditional rights. Thus, the bill would not apply when such rights are brought back to water court for either a finding of reasonable diligence or to make a conditional right absolute. [[234]](#footnote-235)234

As the Bill was finally enacted, everyone seemed to feel it was an acceptable compromise. Most hoped its enactment would put an end to legislative attempts to kill RICDs. In the final analysis, SB 37 was an important victory for proponents of recreation water rights. Despite constitutionally doubtful limitations imposed on this kind of appropriation, the ability to appropriate water for RICDs was again confirmed by the legislature. Most importantly, in the space of a few short years, proponents of water rights for recreation had pushed the law from the State's claim that such water rights could not exist at all, to legislative recognition that fifty percent or more of the historic flow in a ***river*** was likely a reasonable flow amount. In addition, there was the Supreme Court case law recognizing that, in the right circumstances, a "world-class" course claiming almost all of the flow in a stream might be reasonable.

**XIV. OBSERVATIONS AND CONCLUSIONS**

In the end, recreational in-channel water rights won out because they are a true beneficial use of water--***Colorado***'s emerging heritage and legacy. Recreation will only become more important to ***Colorado***'s economy in the future. RICDs provide a particular type of water-based recreation experience that not only serves growing demand for this kind of activity, but promotes related economic development. People are drawn to water, for recreation as well as for simple aesthetic enjoyment.

***Colorado*** water law is moving irretrievably into this changing world, as it must. Taking the long view, it can be said much progress has been made. From its modest origins acknowledging that a boat chute through a dam could serve as a diversion of water for a beneficial recreation use, to its current version under which fifty percent or more of the volume of water in a stream may be appropriated during a specified period for boating use by a recreational in-channel diversion, the law has broadened. In ten years, the bar moved from minimum **[\*257]** amount to float a boat (35 cfs in Fort Collins) to appropriations as great as 1800 cfs and fifty percent or more of historic average flows (as codified by SB 37).

Unnecessary constraints, both administrative and legislative, still remain, however, and should be removed. Given the increasing importance of such uses of water, we believe these limitations will disappear, and RICDs will be treated like any other beneficial use of ***Colorado*** water.

Looking back on this ten-year struggle for recognition of recreational in-channel water rights, a number of important lessons can be drawn. First, significant change does not come easily in the water rights arena. Anyone seeking to step outside traditional notions of consumptive beneficial uses should expect a tough fight.

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), be careful if you seek legislative fixes--you may get more than you bargained for. The CWCB learned this lesson the hard way when it sought to legislate RICDs out of existence, only to legislatively confirm their very existence and cause the political defeat of one of the CWCB's most vigorous defenders.

[*Third*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831), the stipulated settlements with actual water users entered in almost all RICD cases demonstrate that traditional water court proceedings work and, ultimately, even traditional water users are often able to set aside philosophical differences to derive a mutually acceptable settlement in a water court case.

[*Fourth*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831), the CWCB and State Engineer efforts to derail RICDs demonstrate why there should be no absolute state control of water or of state water policy. The prior appropriation doctrine works and is the guiding principle that should not be fundamentally altered.

[*Fifth*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831), future claims for RICD water rights should largely ignore the CWCB's rules regarding RICDs. These rules are beyond the scope of the authority delegated to the agency by the legislature and will have little impact on the final water court determination that will dictate the scope of any RICD right.

[*Sixth*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831), ***Colorado*** water law is adaptable to changing times. That is its beauty and its essence. ***Colorado*** might be said to use a market-based test for allocating water. That is, a use of water is warranted if there is demand sufficient to support payment of the costs necessary to make the use (and if unappropriated water is available). By that measure, there is no question many ***Colorado*** local governments believe boating parks are an important and valuable use of water, and there now have been numerous studies documenting the economic benefits to local communities from their boating parks.

The traditional concern that failure to consume water constitutes waste no longer applies. Legitimate, non-consumptive instream uses of water are increasingly important as the availability of such flows declines and the demands for their use increase. In most respects RICDs represent a particularly smart use of water. They meet a growing **[\*258]** human demand and produce economic benefits without consuming any water. Every drop of water passing through a boating park is available for use downstream. RICDs are a non-polluting use of water. RICDs make possible an additional use of water with no effects on existing uses--the very definition of maximum utilization of ***Colorado***'s water. [[235]](#footnote-236)235 Most importantly, RICDs protect meaningful quantities of water for ***Colorado***'s recreation based economy. Once again, "the greater the flow, the greater the dough for the State as a whole."

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**End of Document**

1. 1 *See* Findings of Fact, Conclusions of Law and Decree of the Court, *In re* Application for Water Rights of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. 2 Oct. 20, 2006) [hereinafter Decree, *In re* Chaffee County]. [↑](#footnote-ref-2)
2. 2 *See* ***COLO.*** WATER CONSERVATION BD., STATEWIDE WATER SUPPLY INITIATIVE WATER DEMANDS FACT SHEET 2, *available at* [*http://www.cwcb.state.****co****.us/IWMD/pdfdocs/Demand\_FactSheet\_7-19-04.pdf*](http://www.cwcb.state.co.us/IWMD/pdfdocs/Demand_FactSheet_7-19-04.pdf) [hereinafter CWCB FACT SHEET]. [↑](#footnote-ref-3)
3. 3 BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, NEWS RELEASE: GROSS DOMESTIC PRODUCT (GDP) BY STATE, 2005 (Oct. 26, 2006), [*http://www.bea.gov/newsreleases/regional/gdp\_state/gsp\_newsrelease.htm*](http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm) . [↑](#footnote-ref-4)
4. 4 [*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) (en banc). [↑](#footnote-ref-5)
5. 5 Amended Findings of Fact, Conclusions of Law and Decree of the Court at 4, *In re* Application of the City of Steamboat Springs, No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 Mar. 13, 2006) [hereinafter Decree, *In re* Steamboat Springs]; Decree, *In re* Chaffee County, *supra* note 1, at 4. [↑](#footnote-ref-6)
6. 6 S.B. 06-037, 65th Gen. Assem., 2d Reg. Sess. (***Colo.*** 2006) (codified at [***COLO.*** *REV. STAT. § 37-92-305(13)(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831)) . [↑](#footnote-ref-7)
7. 7 [***Colo.*** *Water Conservation Bd. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 109 P.3d 585 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-8)
8. 8 [*City of Fort Collins, 830 P.2d at 920, 933.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-9)
9. 9 [*Id. at 920.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-10)
10. 10 [*Id. at 932.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-11)
11. 11 [*Id. at 933.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) Under ***Colorado*** water law, any person may gain a legally-protected right to the use of water through the act of appropriation. ***COLO.*** CONST. art. XVI, § 5. Historically, appropriation was the act of diverting water from its channel that typically manifested individual control of water. [*Fort Morgan Land & Canal* ***Co****. v. South Platte Ditch* ***Co****., 30 P. 1032, 1034 (****Colo.*** *1892).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2K50-0040-01Y2-00000-00&context=1516831) Yet, ***Colorado*** courts long have recognized that the method of controlling water to make possible its beneficial use is unimportant, so long as it is reasonably efficient and accomplishes the beneficial purpose without waste. [*Town of Genoa v. Westfall, 349 P.2d 370, 378 (****Colo.*** *1960);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) [*Thomas v. Guiraud, 6* ***Colo.*** *530, 533 (****Colo.*** *1883).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-3060-0040-03CW-00000-00&context=1516831) The essential test of an appropriation is a demonstration that the water is, or will be, placed to a beneficial use. [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 574 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) (en banc). [↑](#footnote-ref-12)
12. 12 *See* [*City of Fort Collins, 830 P.2d at 931.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) The ***Colorado*** General Assembly enacted Senate Bill 97 in 1973. This law authorized the CWCB to appropriate "minimum" stream flows between designated points on a stream to "preserve the natural environment to a reasonable degree." [***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) (2006). It also removed statutory references to diversion in the definitions of "appropriation" and "beneficial use." In 1987, the General Assembly made it clear only the CWCB is authorized to appropriate instream flows. S.B. 87-212, 56th Gen. Assem., 1st Sess. (***Colo.*** 1987) (codified at [***COLO.*** *REV. STAT. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)). [↑](#footnote-ref-13)
13. 13 [*City of Fort Collins, 830 P.2d at 931.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-14)
14. 14 [***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). [↑](#footnote-ref-15)
15. 15 [*City of Fort Collins, 830 P.2d at 931.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-16)
16. 16 Testimony of Gary Lacy, Transcript of Record, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 Mar. 14. 2001) [hereinafter Transcript of Record, *In re* City of Golden]. [↑](#footnote-ref-17)
17. 17 *Id*. [↑](#footnote-ref-18)
18. 18 *Id*. [↑](#footnote-ref-19)
19. 19 Application for Water Rights of the City of Golden, *In re* Application for Water Rights of the City of Golden, Case No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 June 13, 2001) [↑](#footnote-ref-20)
20. 20 *Id*. [↑](#footnote-ref-21)
21. 21 *Id*. [↑](#footnote-ref-22)
22. 22 Decree, *In re* Application for Water Rights of the City of Golden, Case No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 June 13, 2001) [hereinafter Decree, *In re* City of Golden], *available at* [*http://www.courts.state.****co****.us/supct/watercourts/watdivl/ordergolden.htm*](http://www.courts.state.co.us/supct/watercourts/watdivl/ordergolden.htm) . [↑](#footnote-ref-23)
23. 23 *Id*. [↑](#footnote-ref-24)
24. 24 Testimony of Edward Kowalski, Transcript of Record, *In re* City of Golden, *supra* note 16. [↑](#footnote-ref-25)
25. 25 Orders Re: Applicant's Motions in Limine, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 Mar. 7, 2001). [↑](#footnote-ref-26)
26. 26 *Id*. [↑](#footnote-ref-27)
27. 27 ***Colorado*** Water Conservation Board Statement of Opposition, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 Feb. 25, 1999). [↑](#footnote-ref-28)
28. 28 Objectors' Trial Brief at 2-3, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 Mar. 7, 2001). [↑](#footnote-ref-29)
29. 29 *Id*. at 3. [↑](#footnote-ref-30)
30. 30 City of Golden Reply Brief, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 March 7, 2001). [↑](#footnote-ref-31)
31. 31 *See* [*Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712, 719 (Cal. 1983);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F0N0-003D-J1V1-00000-00&context=1516831) [*Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094-95 (Idaho 1984);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1S80-003D-32Y3-00000-00&context=1516831) [*Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 170-71 (Mont. 1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-50P0-003G-80J8-00000-00&context=1516831) [↑](#footnote-ref-32)
32. 32 [*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) (en banc); *see also* [*Aspen Wilderness Workshop, Inc. 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) (en banc) ("This court has never recognized the public trust doctrine with respect to water.") (Mullarkey, J., dissenting); [*People v. Emmert, 597 P.2d 1025, 1027 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) (en banc) (rejecting the public trust doctrine as a basis for recognizing public recreational use of water over privately owned stream beds of non-navigable waterways). [↑](#footnote-ref-33)
33. 33 City of Golden Trial Brief, *In re* Application for Water Rights of the City of Golden, No. 98CW448 (***Colo.*** Dist. Ct., Water Div. 1 March 7, 2001); *see also* [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 573-574 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) (en banc) (recognizing that ***Colorado*** permits "valid appropriation without a headgate or ditch"); [*Genoa v. Westfall, 349 P.2d 370, 378 (****Colo.*** *1960)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) ("It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made."); [*Larimer County Reservoir* ***Co****. v. Luthe, 9 P. 794, 796 (****Colo.*** *1886)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2XD0-0040-0355-00000-00&context=1516831) ("We think there may be a constitutional appropriation of water without its being at the instant taken from the bed of the stream."); [*Thomas v. Guiraud, 6* ***Colo.*** *531, 533 (****Colo.*** *1883)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-3060-0040-03CW-00000-00&context=1516831) ("The true test of an appropriation 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."). Other Western states have similarly recognized that the diversion element in prior appropriation law is better understood as requiring a degree of control over the water claimed sufficient to affect the desired beneficial use, rather than actual removal of the water from the stream. *See* [*State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 928 (Idaho 1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-22V0-003D-34R2-00000-00&context=1516831) (" [O]ur Constitution does not require actual physical diversion."); [*Stevenson v. Steele, 453 P.2d 819, 826 (Idaho 1969)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-26P0-003D-30D9-00000-00&context=1516831) (finding appropriation for instream livestock use); [*Steptoe Live Stock* ***Co****. v. Gulley, 295 P. 772, 774-75 (Nev. 1931)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3XV2-DX80-00KR-D1TR-00000-00&context=1516831) (mechanical means of diversion from the stream not necessary for a livestock diversion). [↑](#footnote-ref-34)
34. 34 [*Dep't of Natural Res. v. Sw.* ***Colo.*** *Water Conservation Dist., 671 P.2d 1294, 1322 (****Colo.*** *1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-16G0-003D-90VC-00000-00&context=1516831) (en banc) (quoting [*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-35)
35. 35 CWCB FACT SHEET, *supra* note 2. [↑](#footnote-ref-36)
36. 36 Transcript of Record, *In re* City of Golden, *supra* note 16, at 16 (3-12-01). [↑](#footnote-ref-37)
37. 37 *Id* at 181 (3-13-01). The analysis upon which Dr. Raucher based his testimony is found in RAUSCHER ET AL., PRELIMINARY EVALUATION OF THE BENEFICIAL VALUE OF WATERS DIVERTED IN THE CLEAR CREEK WHITEWATER PARK IN THE CITY OF GOLDEN (Dec. 7, 2000). [↑](#footnote-ref-38)
38. 38 Transcript of Record, *In re* City of Golden, *supra* note 16, at 61 (3-12-01). [↑](#footnote-ref-39)
39. 39 *Id*. at 146. [↑](#footnote-ref-40)
40. 40 *Id*. at 12-37 (3-14-06). [↑](#footnote-ref-41)
41. 41 *Id*. at 93 (3-15-06). A subsequent ***Colorado*** Open Records Act request, on file with author, revealed that the CWCB paid Dr. Shelby $ 80,000 for his work in opposing the Golden claim at a rate of $ 385 per hour. [↑](#footnote-ref-42)
42. 42 Transcript of Record, *In re* City of Golden, *supra* note 16. [↑](#footnote-ref-43)
43. 43 *Id*. at 129. [↑](#footnote-ref-44)
44. 44 *Id*. at 130-31. [↑](#footnote-ref-45)
45. 45 *Id*. at 221. [↑](#footnote-ref-46)
46. 46 S.B. 01-216, 63d Gen. Assem., 1st Sess., at 7 11. 22-25 (***Colo.*** 2001) (preamended draft 2, Apr. 24, 2001) (noting that the water judge shall utilize the arbitrary and capricious standard set forth in COLO REV. STAT. § 244-106(6), (7)). The arbitrary and capricious standard gives great deference to the agency decision under review. The CWCB argued in ***Colorado*** *Water Conservation Board v. Upper Gunnison* ***River*** *Water Conservancy District* that its findings and recommendations should be reviewed using this higher standard. The ***Colorado*** Supreme Court rejected this argument:

    By urging a higher standard such as clear and convincing evidence or arbitrary and capricious review, the CWCB is fashioning for itself the role of an administrative adjudicatory agency or a quasi-judicial body--a role which . . . was specifically rejected by the General Assembly. SB 216 does not grant the CWCB the authority to review RICD applications as an administrative adjudicatory agency or quasi-judicial body, and thus, its findings are not entitled to a corresponding deferential standard.

    [*109 P.3d 585, 597 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-47)
47. 47 Decree, *In re* City of Golden, *supra* note 22. [↑](#footnote-ref-48)
48. 48 *Id*. [↑](#footnote-ref-49)
49. 49 *Id*. [↑](#footnote-ref-50)
50. 50 *Id*. [↑](#footnote-ref-51)
51. 51 *Id*. [↑](#footnote-ref-52)
52. 52 *Id*. [↑](#footnote-ref-53)
53. 53 *Id*. ("[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." (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) . [↑](#footnote-ref-54)
54. 54 Several of the stipulations were designed to work in tandem with the boating park so that the timing of upstream diversions would impact flow levels in the boating park only at night, and thus not affect day-time boating. *See* Decree, *In re* City of Golden, *supra* note 22. [↑](#footnote-ref-55)
55. 55 *Id*. [↑](#footnote-ref-56)
56. 56 *Id*. [↑](#footnote-ref-57)
57. 57 *Id*. Notwithstanding this concession in the *Golden* and other RICD cases, the State continued to maintain compact impairment as one of the principal justifications for SB 216. ***COLO.*** WATER CONSERVATION BD., RICD STATEMENT OF BASIS AND PURPOSE 1 [hereinafter CWCB, RICD STATEMENT OF BASIS AND PURPOSE], *available at* [*http://www.cwcb.state.****co****.us/WaterSupply/RICD/Rules/RICDstatementofbasisandpurpose.pdf*](http://www.cwcb.state.co.us/WaterSupply/RICD/Rules/RICDstatementofbasisandpurpose.pdf) . [↑](#footnote-ref-58)
58. 58 Decree, *In re* City of Golden, *supra* note 22. [↑](#footnote-ref-59)
59. 59 For example, the appropriator for an agricultural right decides whether to irrigate 10 acres or 1000 acres. So long as the water can be put to beneficial use without waste, the appropriator has been allowed to make that decision. For boating parks, like other beneficial uses of water, it was shown in the Golden case that the beneficial use increases with increased flows at least up to the design capacity of the course. [↑](#footnote-ref-60)
60. 60 S.B. 01-216, 63d Gen. Assem., 1st Sess. (***Colo.*** 2001) (preamended draft 1, Apr. 24, 2001), *available at* [*http://www.leg.state.****co****.us/2001/inetcbill.nsf/fsbillcont/*](http://www.leg.state.co.us/2001/inetcbill.nsf/fsbillcont/) 1B78415825BD448687256A24006AEB20?Open&file=216PPP\_01.pdf. [↑](#footnote-ref-61)
61. 61 *Id*. at 3 ll. 1-16. [↑](#footnote-ref-62)
62. 62 *Id*. at 3 ll. 9-12. [↑](#footnote-ref-63)
63. 63 *Id*. at 4 ll. 10-12, 7 ll. 3-6. [↑](#footnote-ref-64)
64. 64 *Id*. at 4 ll. 15-18. [↑](#footnote-ref-65)
65. 65 S.B. 01-216, 63d Gen. Assem., 1st Sess., § 2 (***Colo.*** 2001) (codified 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)(2006)). [↑](#footnote-ref-66)
66. 66 S.B. 01-216, § 1 (codified at [***COLO.*** *REV. STAT. § 37-92-102(6)(b)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)-(VI)). [↑](#footnote-ref-67)
67. 67 S.B. 01-216, § 1 (codified at [***COLO.*** *REV. STAT. § 37-92-102(6)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)). [↑](#footnote-ref-68)
68. 68 S.B. 01-216, § 3 (codified at [***COLO.*** *REV. STAT. § 37-92-305(13)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831)). [↑](#footnote-ref-69)
69. 69 S.B. 01-216, § 2 (codified 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)) [↑](#footnote-ref-70)
70. 70 S.B. 01-216, § 1 (codified at [***COLO.*** *REV. STAT. § 37-92-102(6)(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)). [↑](#footnote-ref-71)
71. 71 Legislative Statement, S.B. 01-216, 63d Gen. Assem., 1st Sess. (***Colo.*** 2001) (emphasis added) (on file with author). [↑](#footnote-ref-72)
72. 72 *Id*. [↑](#footnote-ref-73)
73. 73 [*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) (en banc). [↑](#footnote-ref-74)
74. 74 *See* [*Brief for Amici Curiae* ***Colo.*** *Springs Utils. et al., State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003) (No. 01SA252), 2002 WL 32357112.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) [↑](#footnote-ref-75)
75. 75 Eric W. Wilkinson, Briefing Paper to ***Colo.*** Water Conservation Bd., Recreational Instream Flows: Questions, Concerns, and Statutory Considerations (Oct. 23, 2000). [↑](#footnote-ref-76)
76. 76 *See* [*Notice of Non-Participation, State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) (No. 01SA252). [↑](#footnote-ref-77)
77. 77 *Id*. [↑](#footnote-ref-78)
78. 78 [*Opening Brief for State of* ***Colorado*** *at 4-13, State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) (No. 015A252). [↑](#footnote-ref-79)
79. 79 *Id*. at 14-17. [↑](#footnote-ref-80)
80. 80 *Id*. at 21-28. [↑](#footnote-ref-81)
81. 81 This view was clear in the State's original expert report by Dr. Shelby, who proposed a "percentage approach" whereby Golden would get eighty-six percent of the available water instead of a water right for a fixed appropriation. The basis for this novel concept was to leave "14% of the flow in the ***river*** … for other [future] uses." At trial, the State prevented a detailed cross-examination of Dr. Shelby on this approach by agreeing to delete portions of the report from the record already in evidence. *See* Transcript of Record, *In re* City of Golden, *supra* note 16, at 160-63 (3-15-01). [↑](#footnote-ref-82)
82. 82 [*Brief for Rio Grande Water Conservation Dist. et al. as Amici Curiae Supporting Appellants at 21, State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) (No. 01SA252). [↑](#footnote-ref-83)
83. 83 [*Brief for Amici Curiae* ***Colo.*** *Springs Utils. et al., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) note 74, at 2. [↑](#footnote-ref-84)
84. 84 [*Opening Brief for State of* ***Colorado****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) note 78, at 10-11. [↑](#footnote-ref-85)
85. 85 *Id*. at 13. [↑](#footnote-ref-86)
86. 86 *Id*. at 14-16. [↑](#footnote-ref-87)
87. 87 *Id*. at 14-15. [↑](#footnote-ref-88)
88. 88 *See id*. at 14-20; *see also* [*Reply Brief for State of* ***Colorado*** *at 16-17, State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) (No. 01SA252). On this point, the CWCB's argument in the Supreme Court directly contradicted the White Paper it circulated in support of SB 216, which argued that the *Ft. Collins* decision was a very broad holding that needed to be limited by legislation. ***Colo.*** Water Conservation Bd., Recreation Water Rights Legislation (Jan. 2001). [↑](#footnote-ref-89)
89. 89 [*Opening Brief for State of* ***Colorado****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) note 78, at 3. [↑](#footnote-ref-90)
90. 90 *Id*. at 3-4. [↑](#footnote-ref-91)
91. 91 *Id*. at 26. [↑](#footnote-ref-92)
92. 92 *Id*. [↑](#footnote-ref-93)
93. 93 *See* [*City of Golden Answer Brief, State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) (No. 01SA252). [↑](#footnote-ref-94)
94. 94 *Id*. at 6. [↑](#footnote-ref-95)
95. 95 *Id*. at 14. [↑](#footnote-ref-96)
96. 96 *Id*. at 16; *see also* [*City of Thornton v. City of Fort Collins, 830 P.2d 915, 920-21 (****Colo.*** *1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) (en banc). [↑](#footnote-ref-97)
97. 97 [*City of Golden Answer Brief, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) note 93, at 25. [↑](#footnote-ref-98)
98. 98 *Id*. [↑](#footnote-ref-99)
99. 99 *Id*. at 27. [↑](#footnote-ref-100)
100. 100 *Id*. [↑](#footnote-ref-101)
101. 101 *Id*. at 20. [↑](#footnote-ref-102)
102. 102 *Id*. at 41. [↑](#footnote-ref-103)
103. 103 *Id*. One such scenario was that Las Vegas would throw a few rocks in the ***Colorado*** ***River*** at Fruita and claim large flows of water to preclude its upstream consumptive use. [↑](#footnote-ref-104)
104. 104 Aspen also filed a claim in 2000 for water rights for its new boating course. The decree established an absolute right for 270 cfs in June, 350 cfs in July, and 33 cfs in August in the channel of the Roaring Fork in which the course was constructed. Findings of Fact, Conclusions of Law, Judgment and Decree, *In re* Application for Water Rights of the Town of Aspen, No. 00CW284 (***Colo.*** Dist. Ct., Water Div. 5 Aug. 11, 2005). [↑](#footnote-ref-105)
105. 105 *See* Findings of Fact, Conclusions of Law and Decree of the Water Court at 1, 4, *In re* Application for Water Rights of the Eagle ***River*** Water & Sanitation Dist., No. 00CW259 (***Colo.*** Dist. Ct., Water Div. 5 June 5, 2002) [hereinafter Decree, *In re* Eagle ***River***]. [↑](#footnote-ref-106)
106. 106 *Id*. at 2. [↑](#footnote-ref-107)
107. 107 *Id*. [↑](#footnote-ref-108)
108. 108 *Id*. at 2. [↑](#footnote-ref-109)
109. 109 *Id*. [↑](#footnote-ref-110)
110. 110 *See* Findings of Fact, Conclusions of Law and Decree of the Water Court at 2, *In re* Application for Water Rights of the Town of Breckenridge, No. 00CW281 (***Colo.*** Dist. Ct., Water Div. 5 June 5, 2002) [hereinafter Decree, *In re* Town of Breckenridge]. [↑](#footnote-ref-111)
111. 111 *Id*. at 4-5. [↑](#footnote-ref-112)
112. 112 *Id*. at 1-2. [↑](#footnote-ref-113)
113. 113 *Id* at 2. [↑](#footnote-ref-114)
114. 114 *Id*. at 1-2, 5-6. [↑](#footnote-ref-115)
115. 115 *Id*. at 2. [↑](#footnote-ref-116)
116. 116 *Id*. [↑](#footnote-ref-117)
117. 117 *See* Decree, [*In re Town of Breckenridge, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) note 110, at 1; Decree, [*In re Eagle* ***River****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) note 105, at 1. [↑](#footnote-ref-118)
118. 118 *See* Decree, [*In re Town of Breckenridge, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) note 110, at 1; Decree, [*In re Eagle* ***River****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) note 105, at 1. [↑](#footnote-ref-119)
119. 119 *See* State 56(h) Motion for Determination of Question of Law, *In re* Application for Water Rights of the Eagle ***River*** Water & Sanitation Dist. & *In re* Application for Water Rights of the Town of Breckenridge, Nos. 00CW259 & 00CW281 (***Colo.*** Dist. Ct., Water Div. 5 Mar. 8, 2002). [↑](#footnote-ref-120)
120. 120 *See* State's Motion in Limine Regarding the Littleton Boating Course at 1, *In re* Application for Water Rights of the Eagle ***River*** Water & Sanitation Dist. & *In re* Application for Water Rights of the Town of Breckenridge, Nos. 00CW 259 & 00CW 281 (***Colo.*** Dist. Ct., Water Div. 5 Apr. 22, 2002). In 2000, the City of Littleton and the South Suburban Park and Recreation District obtained a decree for three boat chutes located in the South Platte ***River*** below Chatfield Dam. The chutes are decreed for 100 cfs. Findings of Fact, Conclusions of Law, Ruling of the Referee and Decree of the Water Court, *In re* Application for Water Rights of the City of Littleton and the So. Suburban Park & Recreation Dist., No. 94CW273 (***Colo.*** Dist. Ct., Water Div. 1 Sept. 5, 2000). [↑](#footnote-ref-121)
121. 121 *See* Order Denying Opponents' Motions for Summary Judgment and Determination of Questions of Law at 1, *In re* Application for Water Rights of the Eagle ***River*** Water & Sanitation Dist. & *In re* Application for Water Rights of the Town of Breckenridge, Nos. 00CW259 & 00CW281 (***Colo.*** Dist. Ct., Water Div. 5 Apr. 17, 2002). [↑](#footnote-ref-122)
122. 122 *Id*. [↑](#footnote-ref-123)
123. 123 *Id*. [↑](#footnote-ref-124)
124. 124 Decree, [*In re Eagle* ***River****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) note 105, at 4, 8. [↑](#footnote-ref-125)
125. 125 Decree, [*In re Town of Breckenridge, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) note 110, at 4, 8. [↑](#footnote-ref-126)
126. 126 Decree, [*In re Eagle* ***River****, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) note 105, at 3. [↑](#footnote-ref-127)
127. 127 Decree, [*In re Town of Breckenridge, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) note 110, at 6. [↑](#footnote-ref-128)
128. 128 *See* [*State Eng'r v. Eagle* ***River*** *Water & Sanitation Dist., 69 P.3d 1028, 1029 (****Colo.*** *2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) (en banc); [*State Eng'r v. City of 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) (en banc). [↑](#footnote-ref-129)
129. 129 *See* [*Eagle* ***River*** *Water & Sanitation Dist., 69 P.3d at 1029;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48PF-M270-0039-40T7-00000-00&context=1516831) [*City of Golden, 69 P.3d at 1028.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-415B-00000-00&context=1516831) [↑](#footnote-ref-130)
130. 130 *See* Howard Pankratz, *Recreational Water Use Buoyed:* ***Colorado*** *High Court Lets 3 Towns Use* ***Rivers*** *for Kayak Courses*, DENVER POST, May 20, 2003, at Al. [↑](#footnote-ref-131)
131. 131 *See* ***Colo.*** Water Conservation Bd., Recreational In-Channel Diversion Rules, [*2* ***COLO.*** *CODE REGS. § 408-3*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G2D4-00009-00&context=1516831) (Nov. 2001), *superseded by* ***Colo.*** Water Conservation Bd., Recreational In-Channel Diversion Rules, 2 ***COLO.*** CODE BEGS. § 408-3 (Nov. 15, 2005). [↑](#footnote-ref-132)
132. 132 *Id*. P 6. [↑](#footnote-ref-133)
133. 133 *Id*. P 7. [↑](#footnote-ref-134)
134. 134 *Id*. [↑](#footnote-ref-135)
135. 135 *Id*. P 8. [↑](#footnote-ref-136)
136. 136 ***COLO.*** WATER CONSERVATION BD., RECREATIONAL IN-CHANNEL DIVERSION ("RICD") POLICY REGARDING TECHNICAL CRITERIA (Nov. 21, 2003), *available at* [*http://cwcb.state.****co****.us/WaterSupply/RICD/CWCB\_RICD\_12\_1\_2003.pdf*](http://cwcb.state.co.us/WaterSupply/RICD/CWCB_RICD_12_1_2003.pdf) . [↑](#footnote-ref-137)
137. 137 *Id*. at 1. [↑](#footnote-ref-138)
138. 138 *Id*. at 2. [↑](#footnote-ref-139)
139. 139 *Id*. at 4-5. [↑](#footnote-ref-140)
140. 140 *Id*. at 5. [↑](#footnote-ref-141)
141. 141 *See* Application for Surface Water Rights for Recreational In-Channel Uses, *In re* Application for Water Rights of Upper Gunnison ***River*** Water Conservancy Dist., No. 02CW38 (***Colo.*** Dist. Ct., Water Div. 4 Mar. 29, 2002) [hereinafter Application, *In re* Gunnison]. [↑](#footnote-ref-142)
142. 142 *Id*. at 3. [↑](#footnote-ref-143)
143. 143 Memorandum from Rod Kuharich et al. to ***Colo.*** Water Conservation Bd. re: The Upper Gunnison ***River*** Water Conservancy Dist.'s Recreational In-Channel Diversion Application 2 (Sep. 3, 2002), *available at* [*http://cwcb.state,****co****.us/WaterSupply/RICD/UpperGunnsonStaffRecommendation.pdf*](http://cwcb.state,co.us/WaterSupply/RICD/UpperGunnsonStaffRecommendation.pdf) . [↑](#footnote-ref-144)
144. 144 *Id*. [↑](#footnote-ref-145)
145. 145 *Id*. at 2-3. [↑](#footnote-ref-146)
146. 146 Findings and Recommendations of the ***Colo.*** Water Conservation Bd. to the Water Court at 2, *In re* Application for Water Rights of Upper Gunnison ***River*** Water Conservancy Dist., No. 02CW38 (***Colo.*** Dist. Ct., Water Div. 4 Oct. 1, 2002), *available at* [*http://cwcb.state.****co****.us/WaterSupply/RICD/gunnisonfinalfindingsandrecommendation.pdf*](http://cwcb.state.co.us/WaterSupply/RICD/gunnisonfinalfindingsandrecommendation.pdf) . [↑](#footnote-ref-147)
147. 147 Decree at 4, *In re* Application for Water Rights of Upper Gunnison ***River*** Water Conservancy Dist., No. 02CW38 (***Colo.*** Dist. Ct., Water Div. 4 Dec. 26, 2003). [↑](#footnote-ref-148)
148. 148 *Id*. at 8. [↑](#footnote-ref-149)
149. 149 Findings of Fact, Conclusions of Law, and Order at 13-20, *In re* Application for Water Rights of Upper Gunnison ***River*** Water Conservancy Dist., No. 02CW38 (***Colo.*** Dist. Ct., Water Div. 4 Dec 26, 2003). [↑](#footnote-ref-150)
150. 150 Decree, [*In re Application for Water Rights of Upper Gunnison* ***River*** *Water Conservancy District, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) note 147. [↑](#footnote-ref-151)
151. 151 [***Colo.*** *Water Conservation Bd. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 109 P.3d 585, 589 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-152)
152. 152 *Id*. [↑](#footnote-ref-153)
153. 153 [*Id. at 588-89.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-154)
154. 154 [*Id. at 593.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-155)
155. 155 *Id*. [↑](#footnote-ref-156)
156. 156 [*Id. at 594.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-157)
157. 157 [*Id. at 596.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-158)
158. 158 [*Id. at 597.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-159)
159. 159 *Id*. [↑](#footnote-ref-160)
160. 160 *Id*. [↑](#footnote-ref-161)
161. 161 [*Id. at 599.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-162)
162. 162 *Id*. [↑](#footnote-ref-163)
163. 163 [*Id. at 602.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-164)
164. 164 [*Id. at 602-03.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-165)
165. 165 [*Id. at 603.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-166)
166. 166 Application for Surface Water Rights, *In re* Application of the City of Steamboat Springs, No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 Dec. 22, 2003) [hereinafter Application, *In re* City of Steamboat Springs]. [↑](#footnote-ref-167)
167. 167 *Id*. at 2. [↑](#footnote-ref-168)
168. 168 Findings and Recommendations of the ***Colo.*** Water Conservation Bd. to the Water Ct., *In re* Application for Water Rights of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Diva 6 June 11, 2004), *available at* [*http://cwcb.state.****co****.us/WaterSuply/RICD/Mayl4SteamboatdraftRecommendationand%20Findings.pdf*](http://cwcb.state.co.us/WaterSuply/RICD/Mayl4SteamboatdraftRecommendationand%20Findings.pdf) . [↑](#footnote-ref-169)
169. 169 *Id*. at 2. [↑](#footnote-ref-170)
170. 170 *See id*. The Court suggested an analysis of reasonableness "will vary from application to application depending on the stream involved and the availability of water within the basin." [*Upper Gunnison, 109 P.3d at 602.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-171)
171. 171 Amended Findings of Fact, Conclusions of Law and Decree of the Ct. at 9, *In re* Application for Water Rights of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 Mar. 13, 2006) [hereinafter Amended Decree, *In re* City of Steamboat Springs]. [↑](#footnote-ref-172)
172. 172 Accompanying Motion in Limine to Exclude Evidence, *In re* Application for Water Rights of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 May 2, 2005). [↑](#footnote-ref-173)
173. 173 Order Denying CWCB and State Motion in Limine to Exclude Evidence, *In re* Application for Water Rights of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 June 8, 2005). [↑](#footnote-ref-174)
174. 174 Order Denying State Motion to Dismiss, *In re* Application for Water Rights of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6). [↑](#footnote-ref-175)
175. 175 *Id*. [↑](#footnote-ref-176)
176. 176 Reporter's Transcript at 2 ll. 20-23, *In re* Application of the City of Steamboat Springs, Case No. 03CW86 (***Colo.*** Dist. Ct., Water Div. 6 Oct. 28, 2005). [↑](#footnote-ref-177)
177. 177 *See id*. at 13 ll. 22-25. [↑](#footnote-ref-178)
178. 178 *Id*. at 10 ll. 1-3. [↑](#footnote-ref-179)
179. 179 *Id*. at 12 ll. 4-8. [↑](#footnote-ref-180)
180. 180 *Id*. at 14 ll. 10-16. [↑](#footnote-ref-181)
181. 181 *Id*. at 15 ll. 22-25. [↑](#footnote-ref-182)
182. 182 Amended Decree, *In re* City of Steamboat Springs, *supra* note 171. [↑](#footnote-ref-183)
183. 183 *Id*. at 5. [↑](#footnote-ref-184)
184. 184 *Id*. [↑](#footnote-ref-185)
185. 185 *Id*. at 6-7. [↑](#footnote-ref-186)
186. 186 *Id*. at 7. [↑](#footnote-ref-187)
187. 187 [***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) (2006). [↑](#footnote-ref-188)
188. 188 ***Colo.*** Water Conservation Bd., Recreational In-Channel Diversion Rules, [*2* ***COLO.*** *CODE REGS. § 408-3*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G2D4-00009-00&context=1516831), at P 7 (Nov. 15, 2005), *available at* http://www.cwcb.state. ***co***.us/watersupply/RICDRules.htm. [↑](#footnote-ref-189)
189. 189 *Id*. P 7(a). [↑](#footnote-ref-190)
190. 190 *Id*., P 7(a) (v), (vii), (viii), (ix). [↑](#footnote-ref-191)
191. 191 *Id*. P 7(e). [↑](#footnote-ref-192)
192. 192 *See* [***Colo.*** *Water Conservation Bd. v. Upper Gunnison* ***River*** *Water Conservancy Dist., 109 P.3d 585, 595 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) ("SB 216, in its final form, . . . does not give . . . the CWCB any authority to dictate a flow rate or recreation experience for RICD water rights."). [↑](#footnote-ref-193)
193. 193 ***Colo.*** Water Conservation Bd., Recreational In-Channel Diversion Rules P 7(e) (vii), (f). [↑](#footnote-ref-194)
194. 194 ***COLO.*** WATER CONSERVATION BD., RECREATIONAL IN-CHANNEL DIVERSIONS, RULES AND REGULATIONS, STATEMENT OF BASIS AND PURPOSE P 5 (2005), *available at* [*http://cwcb.state.****co****.us/WaterSupply/RICD/RICDSTATEMENTOFBASISANDPURP*](http://cwcb.state.co.us/WaterSupply/RICD/RICDSTATEMENTOFBASISANDPURP) OSEFINAL1105\_FINAL.pdf. [↑](#footnote-ref-195)
195. 195 [*Upper Gunnison, 109 P.3d at 593.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-196)
196. 196 *Id*. [↑](#footnote-ref-197)
197. 197 *See, e.g*., [*Thompson v.* ***Colo.*** *Ground Water Comm'n, 575 P.2d 372, 381 (****Colo.*** *1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1H20-003D-92PY-00000-00&context=1516831) (en banc) (noting that ***Colorado*** only "rejected the pure prior appropriation doctrine as to ground water"). [↑](#footnote-ref-198)
198. 198 DAVID H. GETCHES, WATER LAW IN A NUTSHELL 138 (3d ed. 1997) ("Every state but ***Colorado*** has vested authority in an administrative agency."). [↑](#footnote-ref-199)
199. 199 [*Upper Gunnison, 109 P.3d at 593.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-200)
200. 200 As a state agency, the CWCB has used state funding to oppose applications by local governments. Not only has the CWCB committed considerable staff time to opposing RICDs, it has hired consultants and paid the costs of attorneys and paralegals from the Office of Attorney General. As an example, we used Open Records requests to obtain the identifiable direct costs of the CWCB's opposition to the Steamboat Springs' application in Case No. 03CW86 between January 2004 and November 2005. Payments to consultants totaled $ 69,108. Attorneys from the ***Colorado*** Department of Law (Office of the Attorney General) billed 1,736 hours; legal assistants billed 791 hours. Assuming an average hourly rate of $ 100 (well below rates charged in the private sector), the CWCB spent $ 252,700 of taxpayer money on lawyers. No information was available on the hours committed by CWCB staff or the members of the Board, or on the expenses associated with holding a two-day hearing in Steamboat or participating in a ten-day trial in Steamboat. Nor does this accounting take into consideration the additional expense incurred by the City of Steamboat Springs as a result of being forced to go to trial. Supporting records on file with author. [↑](#footnote-ref-201)
201. 201 S.B. 62, 65th Gen. Assem., Reg. Sess. (***Colo.*** 2005) (introduced version Jan. 14, 2005). [↑](#footnote-ref-202)
202. 202 *Id*. at 2 ll. 9-10. [↑](#footnote-ref-203)
203. 203 *Id*. at 3 ll. 7-14. [↑](#footnote-ref-204)
204. 204 *Id*. at 3 ll. 15-23. [↑](#footnote-ref-205)
205. 205 *Id*. at 4 ll. 20-22. [↑](#footnote-ref-206)
206. 206 S.B. 62, 65th Gen. Assem., Reg. Sess., at 2 ll. 21-24 (***Colo.*** 2005) (engrossed version Feb. 28, 2005). [↑](#footnote-ref-207)
207. 207 Included in the coalition were seventeen local governments, six water districts, sixteen nonprofits, and numerous businesses, associations, and individuals. [↑](#footnote-ref-208)
208. 208 Summarized History for Bill Number 5B05-062, [*http://www.leg.state.****co****.us/*](http://www.leg.state.co.us/) Clics2005a/csl.nsf/BillFoldersAll?OpenFrameSet (select "Senate Bills 051-100"; then follow "H.B. 05-062 History" hyperlink). [↑](#footnote-ref-209)
209. 209 ***Colorado*** State Parks and the Bureau of Land Management cooperatively operate the Arkansas Headwaters Recreation Area, including almost 150 miles of the ***river*** and adjacent lands. *See* ***Colo.*** State Parks, Arkansas Headwaters Recreation Area, [*http://parks.state.****co****.us/Parks/ArkansasHeadwaters/*](http://parks.state.co.us/Parks/ArkansasHeadwaters/) (last visited Apr. 30, 2006). [↑](#footnote-ref-210)
210. 210 ***COLO.*** ***RIVER*** OUTFITTERS ASS'N, EXECUTIVE SUMMARY: COMMERCIAL ***RIVER*** USE IN ***COLORADO*** - 2006 YEAR END REPORT 7 (2006), *available at* [*http://www.croa.org/pdf/*](http://www.croa.org/pdf/) 2006 Commerical Rafting Use Report.pdf. [↑](#footnote-ref-211)
211. 211 Application for Surface Water Rights for Chaffee County at 2-5, Case No. 04CW 129 (***Colo.*** Dist. Ct., Water Div. 2 Dec. 30, 2004). The Salida Park consists of two structures located within 400 feet of one another in the City of Salida. *Id*. at 2-3. The Buena Vista Park at that time had a single structure, but the town intended to build up to three additional structures downstream of the original structure. *Id*. at 3. Claimed beneficial uses were all recreational uses, including boating, kayaking, tubing, rafting, floating, canoeing, and other such general recreational uses. *Id*. at 4. [↑](#footnote-ref-212)
212. 212 Findings of Fact, Conclusions of Law and Decree of the Ct. at 1, *In re* Application for Water Rights of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. 2 Oct. 20, 2006) hereinafter Decree, *In re* Chaffee County. [↑](#footnote-ref-213)
213. 213 Findings of Fact and Recommendations of the ***Colo.*** Water Conservation Bd. to the Water Ct. at 1, *In re* Application of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. 2 Apr. 14, 2006) [hereinafter CWCB Findings, *In re* Chaffee County]. [↑](#footnote-ref-214)
214. 214 The Otero pump station is located upstream of both boating parks and is used to take water out of the Arkansas ***River*** basin for use by the Cities of ***Colorado*** Springs and Aurora. In addition, Twin Lakes, Turquoise Reservoir, and Clear Creek Reservoir are located upstream of both boating parks. [↑](#footnote-ref-215)
215. 215 Decree, *In re* Chaffee County, *supra* note 212, at 4-5. [↑](#footnote-ref-216)
216. 216 *See generally id*. at Ex. C (Memorandum of Understanding). [↑](#footnote-ref-217)
217. 217 *Id*. at 5. [↑](#footnote-ref-218)
218. 218 *Id*. [↑](#footnote-ref-219)
219. 219 *Id*. at Ex. C. [↑](#footnote-ref-220)
220. 220 CWCB Findings, *In re* Chaffee County, *supra* note 213, at 1. [↑](#footnote-ref-221)
221. 221 Decree, *In re* Chaffee County, *supra* note 212, at 1. [↑](#footnote-ref-222)
222. 222 *See* Water Res. Review Comm. 2005, Staff Reports and Committee Memoranda, [*http://www.state.****co****.us/gov\_dir/leg\_dir/lcsstaff/2005/comsched/05WaterResourcesS*](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2005/comsched/05WaterResourcesS) ched.htm. [↑](#footnote-ref-223)
223. 223 S.B. 37, 65th Gen. Assem., 2d Reg. Sess. (***Colo.*** 2006) (introduced version Jan. 11, 2006). [↑](#footnote-ref-224)
224. 224 *Id*. at 2 ll. 9-12. [↑](#footnote-ref-225)
225. 225 *Id*. at 2 ll. 4-10. [↑](#footnote-ref-226)
226. 226 *Id*. at 2 ll. 4-8. [↑](#footnote-ref-227)
227. 227 *Id*. at 5 ll. 18-24. [↑](#footnote-ref-228)
228. 228 *Id*. at 6 ll. 5-13. [↑](#footnote-ref-229)
229. 229 *Id*. at 6 ll. 18-24. [↑](#footnote-ref-230)
230. 230 S.B. 37, 65th Gen. Assem., 2d Reg. Sess. at 4 ll. 21-22 (***Colo.*** 2006) (engrossed version Mar. 2, 2006). [↑](#footnote-ref-231)
231. 231 *Id*. at 7 ll. 3-7. [↑](#footnote-ref-232)
232. 232 S.B. 37, 65th Gen. Assem., 2d Reg. Sess. at 7 ll. 19-24 (***Colo.*** 2006) (revised version Mar. 2, 2006) (codified at [***COLO.*** *REV. STAT. § 37-92-305(13)(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2006)). [↑](#footnote-ref-233)
233. 233 S.B. 37, 65th Gen. Assem., 2d Reg. Sess. at 7 ll. 19-27 (revised version) (codified at [***COLO.*** *REV. STAT. § 37-92-305(13)(f)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831)). [↑](#footnote-ref-234)
234. 234 S.B. 37, 65th Gen. Assem., 2d Reg. Sess. at 8 ll. 9-12 (revised version). [↑](#footnote-ref-235)
235. 235 The court-made doctrine of maximum utilization emerged in the context of enabling development of out-of-priority groundwater. [*Fellhauer v.* ***Colorado****, 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) (en bane). It was enunciated to provide a policy basis for allowing additional uses of water that would otherwise have been barred by a strict application of the priority doctrine to protect existing water rights. It is somewhat ironic that it was used by the CWCB in this context in an attempt to prevent a legitimate non-consumptive use of water that has no effect whatsoever on existing water rights. [↑](#footnote-ref-236)