

# [***ARTICLE: The Evolution of Colorado's Recreational In-Channel Diversions***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4RJK-H9R0-00SW-503R-00000-00&context=1516831)

Fall, 2006

**Reporter**

10 U. Denv. Water L. Rev. 73 \*

**Length:** 12918 words

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**Text**

**[\*73]**

I. Introduction

Recreational In-Channel Diversions ("RICDs") are an area of ***Colorado*** water law that has developed only in recent years. This paper will first examine the obstacles to decrees for instream flows for recreational use under traditional ***Colorado*** water law. Next, it will detail the new statutory scheme that the legislature has put into place for the decree of RICDs. Then, it will discuss subsequent case law and statutory changes. Finally, this paper will suggest changes to streamline the RICD process and create useful guidelines for decree amounts.

II. Traditional ***Colorado*** Water Law and Instream Flows

Traditional ***Colorado*** water law contains two elements which, until recently, made it impossible to obtain a decree without diverting water out of the stream channel. To obtain a decree, the applicant must divert **[\*74]** water from the stream, and put it to a beneficial use. Both of these issues are resolved to the extent that they no longer bar recreational instream flow decrees. However, the exact meaning of beneficial use in the RICD context remains the subject of debate and litigation. Clarification of this requirement is necessary to fix the current system

A. The diversion requirement

Traditionally, an applicant could only obtain a decree with a diversion, and water controlled in the stream did not qualify as a diversion. "Until the legislature in 1969 specifically made diversion an essential element of appropriation, diversion was a court-made element." [[1]](#footnote-2)1 ***Colorado*** courts held that "the rule is elementary that the first essential of an appropriation is the actual diversion of the water with intent to apply to a beneficial use." [[2]](#footnote-3)2 "There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream...without diversion of any portion of the water 'appropriated' from the natural course of the stream." [[3]](#footnote-4)3 When the General Assembly defined "diversion" in the 1969 Act, however, it gave the term a broader definition: "'Diversion' or 'divert' means removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir, by-pass, pipeline, conduit, well, pump, or other structure or device...." [[4]](#footnote-5)4

The first sign of judicial abrogation of the diversion requirement came in ***Colorado*** ***River*** Water Conservation District v. ***Colorado*** Water Conservation Board. In 1979, the ***Colorado*** Supreme Court held that instream flow appropriations by the ***Colorado*** Water Conservation Board are not constitutionally prohibited by the reference in the ***Colorado*** Constitution to the right to appropriate by diverting water. [[5]](#footnote-6)5 Additionally, the court held that the legislature specifically contemplated appropriations without diversion when it removed the diversion requirements from the definition of appropriation and revised the definition of beneficial use to include a provision for use for flows "as are required to preserve the natural environment to a reasonable degree." [[6]](#footnote-7)6 While this case was an important step in the evolution of the term "diversion," it is important to note that the appropriator was the ***Colorado*** **[\*75]** Water Conservation Board ("CWCB"), which is the only entity in ***Colorado*** that is statutorily entitled to appropriate instream flows. [[7]](#footnote-8)7

In City of Thornton v. City of Fort Collins, the court did away with the final vestiges of the old diversion requirement. [[8]](#footnote-9)8 Here, the City of Fort Collins applied for a decree of 55 cubic feet per second ("cfs") which the city was diverting, or planning to divert, within the ***river*** channel by means of two dams. [[9]](#footnote-10)9 One dam diverted the ***river*** back into its original channel. [[10]](#footnote-11)10 The other served as both a fish ladder and boat chute. [[11]](#footnote-12)11 The water court held that the dam which served a fish ladder and boat chute did not add any control to the ***river***. [[12]](#footnote-13)12 The ***Colorado*** Supreme Court reversed, holding that "in general, boat chutes and fish ladders, when properly designed and constructed, are structures which concentrate the flow of water to serve their intended purposes. A chute or ladder therefore may qualify as a 'structure or device' which controls water in its natural course or location under section 37-92-103(7)." [[13]](#footnote-14)13 Thus, appropriators other than the CWCB still need to control the water in some way within the natural channel to obtain a decree, but the new definition of "diversion" allows for decrees which would not be possible under the traditional diversion requirement.

B. Beneficial use

"Beneficial use of water is the most fundamental diversion requirement." [[14]](#footnote-15)14 Like the definition of diversion, the concept of beneficial use has evolved over time. "In the late nineteenth and early twentieth centuries, concepts of beneficial use focused on a limited category of activities associated with then-predominant uses of water such as domestic uses, farming, stock raising, mining, milling, power production, and other fledgling manufacturing enterprises." [[15]](#footnote-16)15 "In general, the common law interpretation of beneficial use under the prior appropriation doctrine compares wastefulness of a specific use of water to other possible uses and to alternative means of achieving the purpose for that particular use." [[16]](#footnote-17)16 In 1973, the passage of Senate Bill 97 replaced the common law definition of beneficial use, defining it as: **[\*76]**

The use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife… For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of ***Colorado*** in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree. [[17]](#footnote-18)17

This expanded definition of beneficial use made appropriations for instream uses possible. This statute took the traditional view of beneficial use, including the "without waste" provision, and added specific references to recreation, wildlife, and the natural environment. [[18]](#footnote-19)18 However, ***Colorado*** statute also provided that the CWCB was the sole appropriator for the newly included instream flow purposes. [[19]](#footnote-20)19

The CWCB has interpreted the term "minimum flows" quite literally. For instance, on Boulder Creek below the confluence with North Boulder Creek, the CWCB appropriated 6 cfs from November 1 to March 31, and 15 cfs from April 1 to October 31. [[20]](#footnote-21)20 The mean daily streamflows over the last 88 years from November 1 to March 31 range from a low of 23 cfs on January 1 to a high of 32 cfs on March 30. [[21]](#footnote-22)21 The mean daily streamflows between April 1 and October 31 range from a low of 24 cfs on October 23 to a high of 379 cfs on June 22. [[22]](#footnote-23)22 The minimum flow decrees obtained by the CWCB here are for amounts well below the flows one would expect in the creek even with existing diversions. [[23]](#footnote-24)23 The CWCB makes calls on a small percentage of **[\*77]** the streams for which it has instream flow rights. In 2005, the CWCB made nine calls with instream flow rights. [[24]](#footnote-25)24 Thus, it would be hard to argue that the amounts decreed to the CWCB for instream flows are greater than the minimum flows required to preserve the natural environment.

C. The Golden Decree

In 1998, the City of Golden filed an application for a decree for its whitewater park. [[25]](#footnote-26)25 The city requested 1000 cfs for the months of May, June, and July because 1000 cfs was the design capacity of the course and a sufficient flow to attract world class boaters and elite competitions. [[26]](#footnote-27)26 The city also requested lower flows for other months. [[27]](#footnote-28)27 The city perfected a portion of these flows in 1999, but some of the claimed flows remained conditional until the city could show that boaters actually used the flow rates. [[28]](#footnote-29)28 The water court addressed the issues of both diversion and beneficial use. The Division 1 Water Court cited the Fort Collins case for the proposition that "the structures in the Course control, concentrate and direct the flow of water through the Course in a manner that constitutes a diversion under C.R.S. 0S 37-92-103(7)." [[29]](#footnote-30)29 The court found that use of water for recreational boating is a beneficial use under [*C.R.S. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [[30]](#footnote-31)30 It also held that both the high runoff flows and the lower flows claimed at other times of the year constituted beneficial use without waste:

Flows of 1,000 cfs and higher are also best for the elite competitions such as the Eddie Bauer Classic and the U.S. Olympic trials that Golden and others have held and plan to continue to hold on the Course… The water diverted and controlled by the Course at these lower flows is also beneficially used for recreational purposes. [[31]](#footnote-32)31

**[\*78]** The court also discussed the economic benefit that accrued to Golden as a result of the park, including the correlation between higher flows and greater economic benefit. [[32]](#footnote-33)32 This economic benefit was essential to a finding that higher flows were not wasteful even though lower flows still allowed use of the course. [[33]](#footnote-34)33

In July of 2000, the water court granted Golden a decree for its whitewater park and proposed extension. The state engineer appealed the decision, but the ***Colorado*** Supreme Court sitting en banc was equally divided, effectively affirming the decree. [[34]](#footnote-35)34

This decision sparked considerable concern from traditional appropriators, especially those who had designs on future upstream transfers, storage, and trans-mountain diversion projects.

Since Golden's filing, many water users...expressed concern that these types of applications could: 1) hinder flexibility by limiting exchanges of water among water users; 2) limit ***Colorado***'s ability to use water allocated under inter-state compacts; and 3) circumvent the State's instream flow program by essentially authorizing private instream flow water rights. [[35]](#footnote-36)35

These concerns arose because the Golden decree limited the option of transferring water rights on Clear Creek from downstream of Golden to upstream of Golden.

Clear Creek at Golden has peaked over 1000 cfs in 16 of the last 30 years. [[36]](#footnote-37)36 Golden has a conditional decree for 1000 cfs during three months: May, June, and July. [[37]](#footnote-38)37 The mean streamflow in Clear Creek in May is 321 cfs, the mean streamflow in June is 750 cfs, and the mean streamflow in July is 442 cfs. [[38]](#footnote-39)38 Unlike the very minimal instream flow decrees obtained by the CWCB, the amount of this decree is quite large in relation to average streamflow. Because there is wide variation in streamflow from year to year and the flow peaks on different dates **[\*79]** from year to year, the conditional rights will gradually become perfected until the amount of the perfected right will exceed the flow in the creek the vast majority of the time. Thus, depending on the scope of junior protection, transfers of a senior right from downstream of Golden to diversions upstream of Golden may be barred because of this decree.

III. The RICD System

Senate Bill 216 developed the RICD system. [[39]](#footnote-40)39 This bill created an entirely new process for obtaining an instream decree for a whitewater park. The drafters of the bill, however, left many aspects of the process unclear. Since the passage of the bill, there has been one ***Colorado*** Supreme Court case interpreting the bill and a recent legislative amendment. [[40]](#footnote-41)40 The RICD process is by no means settled. RICD law has evolved rapidly over the past several years and will continue to do so.

A. Senate Bill 216

Senate Bill 216 created the framework that currently governs RICDs. [[41]](#footnote-42)41 It was a reaction to the Golden Decree and the flood of instream flow applications expected to follow. [[42]](#footnote-43)42 The hurried nature of this process later became apparent when it came time to apply the bill's mandates. First, the bill limited the class of appropriators who may obtain a recreational in channel diversion to "any county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district." [[43]](#footnote-44)43 More importantly, it created a procedure whereby the applicant submits the water rights application to the CWCB for review. [[44]](#footnote-45)44 "Following a public hearing, if requested by any party, the board shall make findings of fact and a final recommendation as to whether the application should be granted, granted with conditions, or denied." [[45]](#footnote-46)45 Under SB-216 the CWCB was then to make recommendations based on the following factors: **[\*80]**

(I) Whether the adjudication and administration of the recreational in-channel diversion would materially impair the ability of ***Colorado*** to fully develop and place to consumptive beneficial use its compact entitlements;

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

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

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

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

(VI) Such other factors as may be determined appropriate for evaluation of recreational in-channel diversions and set forth in rules adopted by the board, after public notice and comment. [[46]](#footnote-47)46

The bill defined RICDs as "the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use...for a reasonable recreation experience in and on the water." [[47]](#footnote-48)47 The determinations of the CWCB were to be incorporated into the traditional water court framework. "The water court shall apply [these factors]. All findings of fact contained in the recommendation of the ***Colorado*** water conservation board shall be presumptive as to such facts, subject to rebuttal by any party." [[48]](#footnote-49)48

The legislative record on SB 216 reveals a contentious debate with several arguments made by proponents from both sides. The Senate Committee on Public Policy and Planning held hearings on April 12 and 18, 2001. [[49]](#footnote-50)49 Supporters of the bill pointed to the Golden Decree as a sign of things to come and a bar to future exchanges that will be necessary for future municipal supply. SB 216 specifically did not apply retroactively to the Golden Decree. [[50]](#footnote-51)50 Senator Anderson noted that there was already a rush to the courthouse to acquire decrees for whitewater parks and that these decrees were for large amounts and, in some cases, could constitute the entire flow of a stream. [[51]](#footnote-52)51 Chris Paulson of the ***Colorado*** Water Partnership discussed the problem on a large scale and the urgent need for action: **[\*81]**

"The current system is very broken… The one thing we know is that if we do nothing and you have an escalation of water wars along both the Front Range and West Slope, having each succeeding community rush to get the next adjudication, pretty soon you will have de facto removed the ability to exchange water… We're looking at a need for 300 thousand acre-feet in the next 20 years. We are looking at the lead time of 20 years to build major water projects. And if we destroy in one year by inaction the ability to exchange some of these effluent systems or in some cases junior water rights for municipal use, we will have missed a golden opportunity." [[52]](#footnote-53)52

Another rationale for the bill was the possibility that unchecked proliferation of instream decrees close to the edge of the state could send water over the border when the state could otherwise utilize it here under our interstate compacts. Hal Simpson, the state water engineer, noted that "if a large recreational in-channel water right was granted at a certain location it could very well prevent or limit our ability to develop our unused compact entitlements...I believe the ***Colorado*** Water Conservation Board can deal with this public policy issue much better than the water court." [[53]](#footnote-54)53 He also mentioned the possibility that instream rights only be in effect during the daytime, so that water could be held for storage or exchange upstream. [[54]](#footnote-55)54 He thought the CWCB should administer this option because they are an administrative agency better suited for this kind of rulemaking. [[55]](#footnote-56)55

Finally, some SB 216 supporters argued that few in-channel diversion applications would actually be contentious. [[56]](#footnote-57)56 Mark Phifer of the ***Colorado*** Water Congress said, "as a matter of fact most of these developments, if they are high in the headwaters, like Vail or Breckenridge, probably would have very little opposition in these administrative proceedings, and would be granted certainly in keeping with the amount sought to be appropriated." [[57]](#footnote-58)57 This later proved to be an inaccurate assumption about the nature of the CWCB proceedings.

The overriding theme throughout the case for SB 216 was that recreational use, while beneficial, is a different kind of use. The bill actually expressed that "water rights for recreational in-channel diversions...shall not constitute a use of water for domestic purposes." [[58]](#footnote-59)58 This precludes any claim that recreational in-channel diversions should benefit from the state's preference for municipal uses. Recreational use is different because the standards for beneficial use without waste **[\*82]** are unclear and there is potential for a single action to tie up the entire excess flow of a creek or ***river***. Thus, applications for recreational in-channel diversions should receive an extra level of scrutiny before they receive the protections to which appropriators in ***Colorado*** are generally entitled. This extra level of scrutiny amounts to an inquiry not only into whether the decree interferes with a currently existing water right, but also an inquiry into whether it will interfere in the future with uses of water which will be in the public interest. [[59]](#footnote-60)59

Bill opponents also made several arguments. First, opponents argued SB 216 was inconsistent with the fundamental principle of ***Colorado*** water law which gives the water courts the power to adjudicate decrees: "The Water Conservation Board...has a forum now in which its issues and concerns with these types of water rights may be addressed. And that forum is Water Court. Water Court is the place for making determinations about disputed facts… That's the way its been for the last 100 plus years." [[60]](#footnote-61)60 SB 216 supporters replied that the existing minimum instream flows held by the CWCB are not part of the traditional system. [[61]](#footnote-62)61 "These are a hybrid variant of private diversion rights, but they are constitutional and different." [[62]](#footnote-63)62

A larger issue was opposition to adjudication by the CWCB. Opponents were concerned about adjudication by the CWCB for two reasons. First, some were opposed to CWCB adjudication because that had not been its role in the past.

The board members all own water rights or represent people who own water rights and they are not and cannot be impartial in decision making in a way that a water court judge who does not own water rights can be. The Water Conservation Board is, and should be an advocate, but not a judge. [[63]](#footnote-64)63

Second, many opponents of the bill openly questioned whether the CWCB would be a fair arbiter of instream flow issues given the views the board had expressed in the past. "The CWCB has already indicated and voiced opposition to these kind of water right filings. So the real concern and you've already heard it today, is that you're not going to get a fair shake." [[64]](#footnote-65)64 Given the broad language of the statute, this was a cause of concern. **[\*83]**

With all due respect to the CWCB, we really do view this as a power grab. What I mean by that is this bill lets the CWCB tell the appropriator how much water they get, if any, and what kind of whitewater course they can build....There's also a provision of this bill that says the CWCB may consider..."such other factors as may be determined appropriate." That is not a legal standard, that's carte blanche, and that's one of the big concerns. [[65]](#footnote-66)65

Finally, an issue the hearings only touched on briefly but which probably held the greatest legal significance is that, assuming there was a problem to begin with, the bill delegated the problem rather than solving it. [[66]](#footnote-67)66 The bill did not give a workable definition of the amount of water beneficially used in the RICD context. It asked the CWCB to make findings of fact and then directed them to determine whether the requested amount is reasonable without specifying any guidelines for what is reasonable. Thus, the bill added another layer of bureaucracy, but the central question of what constitutes "beneficial use without waste" remained as unclear as ever. Despite the objections to the bill that surfaced during the hearings, the bill passed both the House and Senate in May and the governor signed it into law on June 5, 2001. [[67]](#footnote-68)67

B. The Gunnison case

SB 216 left many questions about the nature of the new RICD process, including whether the CWCB's determinations should be strictly factual and whether the CWCB's recommendations bind the water court. The first RICD application the CWCB heard was for a whitewater park on the Gunnison ***River***. In March 2002, the Upper Gunnison ***River*** Water Conservancy District filed for a RICD for its proposed whitewater park on the Gunnison ***River*** near Gunnison. [[68]](#footnote-69)68 The applicant asked for a decree for the following schedule of flows from May to September: [[69]](#footnote-70)69

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| May | May | June | June | July | July | Aug. | Aug. | Sept. | Sept. |
| 1-15 | 16-31 | 1-15 | 16-30 | 1-15 | 16-31 | 1-15 | 16-31 | 1015 | 16-31 |
| 570 | 1190 | 1460 | 1500 | 1100 | 530 | 460 | 390 | 300 | 270 |

**[\*84]** The CWCB entered a finding to the water court that recommended approval of the application in the amount of 250 cfs from May through September and 0 cfs for the rest of the year.[[70]](#footnote-71)70 The CWCB exercised considerable discretion to reduce the amount of water under consideration from the schedule shown above (270-1500 cfs) to a constant 250 cfs. Because they reduced the amount to a level that they considered reasonable, the findings favor approval of the application. It is likely that, had the CWCB made findings on the schedule of flows requested in the application, the findings would not have been in favor of approval.

The applicant then proceeded to the water court, which addressed "what it determined to be the 'primary issue' -- 'whether Applicant has overcome the rebuttable presumption that 250 cfs for the entire rafting season is the appropriate quantity of water for its proposed whitewater park recreational use.'" [[71]](#footnote-72)71 The applicant met its burden of proving that a greater amount was appropriate. [[72]](#footnote-73)72 This created a big problem: the CWCB did not make any factual findings on the statutory factors for the flows above 250 cfs. Thus, there were no presumptively valid findings for the water court to use as a starting place, forcing the water court to make its own determinations as if the CWCB hearing had never happened. First, the water court determined "that the amount sought in this instance does not reach the level of speculation or waste." [[73]](#footnote-74)73 Then, it proceeded to do its own analysis of the statutory factors set forth in SB 216. The water court concluded that the requested flows were appropriate under the statutory factors, and granted the applicant a decree for the amount in the application with a priority date of October 20, 1998. [[74]](#footnote-75)74 The CWCB appealed the decree, claiming that SB 216 vested the CWCB with the discretion to determine the minimum flow for a reasonable recreational experience, that the water court erred in not following the CWCB's recommendation in the absence of clear and convincing evidence, and that the water court erred in failing to limit the decreed amount to the minimum flow for a reasonable recreational experience. [[75]](#footnote-76)75

The ***Colorado*** Supreme Court first found that SB 216 vested the CWCB with the authority only to analyze the application as presented, not to suggest an alternate flow amount that would satisfy the beneficial use requirements and the statutory factors. "The General Assembly **[\*85]** 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." [[76]](#footnote-77)76 The court noted that even the CWCB's own rules direct the board to make findings of fact on the application as submitted. [[77]](#footnote-78)77

In practice, the CWCB suggesting alternate flows would circumvent their participation in the process. After the CWCB hearing, the applicant would proceed to the water court with its original application. If the CWCB has only made findings of fact on different amounts, those findings will be meaningless to the water court's efforts to evaluate the entire application. Because the CWCB made findings on only 250 cfs, the water court had to approach the application without the guidance that the legislature intended. Thus, "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." [[78]](#footnote-79)78

Next, the court addressed the presumptive effect of the CWCB's findings. The CWCB argued for a higher burden of proof than a preponderance of the evidence to rebut its findings' presumptive effect. The board argued that the applicant should have to rebut the board's findings of fact with clear and convincing evidence. [[79]](#footnote-80)79 The court firmly rejected this argument: "Nothing in SB 216 elevates this default burden of proof." [[80]](#footnote-81)80 "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, as discussed above, was specifically rejected by the General Assembly." [[81]](#footnote-82)81 Thus, the court held that the water court "properly determined that any party disagreeing with the CWCB's findings had a burden of going forward with evidence to rebut or meet the presumption. This burden of production, it should be noted, does not shift the overall burden of proof which remains on the applicant throughout adjudication." [[82]](#footnote-83)82

Finally, the court agreed with the CWCB that the water court should limit the amount decreed to the minimum amount necessary for a reasonable recreational experience. The court noted the difficulty of defining "minimum stream flow" and "for a reasonable recreational experience in and on the water," especially the term "reasonable **[\*86]** recreational experience." [[83]](#footnote-84)83 The court recognized this term "has no plain meaning and is reasonably susceptible to multiple meanings," therefore it explored the legislative history of SB 216 to define the term. [[84]](#footnote-85)84 The court discussed the legislative record at length, and concluded the following guideline is appropriate:

Once the water court has determined whether a RICD application is for an objectively reasonable recreation experience in and on the stream in question, then it must determine the minimum amount of stream flow necessary to accomplish that intended recreation experience. Hence, the water court may be required to weigh conflicting expert testimony given by course designers or other interested parties, and make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience.

In any event, it is clear from the plain language of the statutory definition of a RICD, as well as SB 216's legislative history, that the water court may not take the appropriator's suggestion, as set forth in the application, of what a reasonable recreation experience is for the stream involved at face value, nor should the water court accept without scrutiny the applicant's analysis of what stream flow is necessary to achieve that objective. [[85]](#footnote-86)85

This guidance does not entirely resolve the dispute over what actually is the minimum stream flow for a reasonable recreational experience.

C. CWCB findings after the Gunnison case

After the ***Colorado*** Supreme Court's scathing review of the CWCB in the Upper Gunnison ***River*** Water Conservancy District case, the CWCB had to dramatically change the findings it made on RICD applications. The CWCB was forbidden from recommending the flows it thought were appropriate, and required to make findings on the flows requested in the application. The first application heard by the CWCB after the Gunnison decision was submitted by Chaffee County, which claimed a RICD for the whitewater parks in Salida and Buena Vista (the County sought one RICD for both parks). The amounts initially sought were: [[86]](#footnote-87)86**[\*87]**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Time Period | Jan. 1 - | May 16 - | July 1- | Sept 1- |
|  | May 15 | June 30 | Aug. 31 | Dec. 31 |
| Flows (cfs) | 250 cfs | 1800 cfs | 700 cfs | 250 cfs |

In its recommended findings of fact and recommendations, the CWCB made a concerted effort to comply with the Gunnison decision. Soon after the hearing, the CWCB Staff issued its Recommended Findings of Fact and Recommendations:

(a) impair the ability of ***Colorado*** to fully utilize its compact entitlements because there was potential for upstream diversion for beneficial use that would be foreclosed by a RICD;

(b) that the RICD encompassed 25 miles of stream and was an inappropriate stream reach;

(c) there was not adequate access to the proposed parks (although there were free public parking lots at both proposed locations);

(d) that there were no CWCB in-stream flow rights that would be impaired by the RICD and;

(e) that the RICD would impair the maximum utilization of ***Colorado*** water resources because of the potential for upstream junior appropriations that would be foreclosed by the senior RICD. [[87]](#footnote-88)87

Although discussed separately, the draft Finding came to these same conclusions for each of the three requested flow amounts. [[88]](#footnote-89)88 The only factor enumerated by the legislature that did not pose a problem was interference with existing minimum instream flow rights. [[89]](#footnote-90)89

After the hearing and the draft Finding, Chafee County requested extra time to meet with the objectors and discuss a settlement. [[90]](#footnote-91)90 Chaffee County settled with all objectors except the CWCB and the State Engineer. [[91]](#footnote-92)91 In order to reach a settlement, Chaffee County made significant changes to their RICD application.

As you may recall, the application initially requested 1800 cfs from May 15 to June 30. The final application requested a variable amount **[\*88]** of water for this time period. [[92]](#footnote-93)92 It provided that on or before April 1 of each year, the County shall inform the division engineer of eight "event days" during June where the water right under the RICD will be 1800 cfs. [[93]](#footnote-94)93 In addition, on or before May 10 of each year, the County must notify the Division Engineer of up to 30 consecutive days within the high flow period when the amount of the water right for the RICD will be 1400 cfs. [[94]](#footnote-95)94 The eight event days must be within this 30 day period. [[95]](#footnote-96)95 The water right for the remainder of the high flow period is 700 cfs. [[96]](#footnote-97)96 Once designated, the 30 day period cannot be changed. [[97]](#footnote-98)97 In addition, the final application included provisions for reduced calls in some years ("Recovery Years") if needed to refill depleted reservoirs. [[98]](#footnote-99)98 Finally, in the final application, Chaffee County agreed to implement a reduced RICD call in order to allow "Limited Future Exchanges." [[99]](#footnote-100)99

The Final Findings of Fact and Recommendations that the CWCB filed with the water court (which contained findings on the final application described above) recommended that the application be granted based on the following findings:

(a) that with mitigating terms and conditions the RICD will not impair the ability of ***Colorado*** to fully develop its compact entitlements;

(b) the stream reach is appropriate if the RICD is administered by measurement at one gauge to avoid the issues created by the 25 miles of stream reach between the proposed parks;

(c) the applicant had demonstrated adequate access;

(d) that there were no in-stream flow rights that would be impacted by the RICD, and;

**[\*89]**

(e) with mitigating terms and circumstances the RICD would not infringe on the ability of ***Colorado*** to make maximum utilization of its water resources. [[100]](#footnote-101)100

The final Finding of Fact and Recommendations suggested that the decree be limited to mostly daytime use, and that flow be measured at one gauge above the entire proposed project so that it did not encumber a 25 mile stretch of stream, and that the RICD only be callable when such a call would result in a specified flow. [[101]](#footnote-102)101 Not surprisingly, the Final Findings of Fact and Recommendations on the substantially watered down final application are completely different from the original draft Finding. On May 24, 2006 the Division 2 Water Court approved the final application. [[102]](#footnote-103)102

D. The CWCB's stance on RICDs

One fact that is very important to the RICD process, but that is not stated in any statute or caselaw, is that the CWCB has historically been hostile towards instream flows for recreational purposes. The mission of the CWCB is to conserve, develop, protect and manage water for present and future generations. [[103]](#footnote-104)103 The dual objectives of development and conservation have frequently conflicted, leading many to question whether one entity should be responsible for both. Throughout the CWCB's history, it has heavily favored development and consumptive uses over conservation and instream uses. The CWCB has been sued in the past for declining to make a call to enforce its own instream flow decrees. [[104]](#footnote-105)104 In addition, the CWCB (along with the state engineer) appealed the Golden decree to the ***Colorado*** Supreme Court after all other objectors had been satisfied by concessions from the applicants. [[105]](#footnote-106)105 During the senate hearings, some opponents of SB 216 pointed out this bias of the CWCB against significant instream flows as a flaw in the proposed process. [[106]](#footnote-107)106 **[\*90]**

The CWCB has not been shy about showing its collective disdain for RICDs. In the ironically titled publication "In Stream ***Colorado***," the CWCB staff attorney noted that the Golden decree and others like it could be "potentially devastating." [[107]](#footnote-108)107 More importantly, the CWCB's findings for the RICD applications that it has evaluated have been overwhelmingly negative. In the Gunnison case, the CWCB recommended a flow for the entire appropriation period that was lower than any of the flows requested, and that was one-sixth of the largest flow amount requested. [[108]](#footnote-109)108 The Chaffee County RICD, however, represents a first for the CWCB -- a recommendation that the water court grant a decree for an RICD. This may signal a softer stance whereby the Board will recommend granting an application after settlement with all objectors, including those objectors who are just contemplating future exchanges.

E. Proposed Senate Bill 62

Even before the ***Colorado*** Supreme Court's decision in Upper Gunnison ***River*** Water Conservancy District, the General Assembly noticed the uncertainty that characterized the RICD process. The water court in Gunnison had ignored the CWCB's findings and had issued a decree for the full amount requested in the application. The Gunnison case was being appealed to the ***Colorado*** Supreme Court, which would decide what authority the CWCB actually had and what was the effect was of a CWCB recommendation.

Senate Bill 62 was an attempt to limit the amounts decreed for RICDs. The relevant section of this bill stated "water diverted for a Recreational In-Channel Diversion in excess of three-hundred fifty cubic feet per second shall conclusively be deemed to be wasted and not placed to beneficial use." [[109]](#footnote-110)109 The General Assembly had tried unsuccessfully in SB 216 to limit the size of in-channel diversions to a reasonable amount by delegating fact-finding authority to the CWCB. An alternate way to proceed is to limit in-channel decrees to one amount that is specifically enumerated in the statute and not subject to alternate interpretation. SB 62's authors adopted this strategy. While SB 62 would have succeeded in limiting the size of in-channel decrees, it would not limit them to a reasonable amount unless the reasonable flow for a given whitewater park coincidentally happened to be 350 cfs. **[\*91]** Whitewater Park engineers build whitewater parks to the scale of the stream, and design them for amounts of water that are frequently in the stream during the summer months. Assuming a design is successful, these are the amounts that are beneficially used. The amounts vary widely and are usually more than 350 cfs. While 350 cfs may make some whitewater parks usable, but is only a trickle in others. Thus, it ignores reality to artificially cap the amount that can be beneficially used on all streams. SB 62 passed the Senate but was voted down in the House on March 30, 2005. [[110]](#footnote-111)110

F. Senate Bill 37

The General Assembly's most recent attempt to tackle the RICD issue was Senate Bill 37. [[111]](#footnote-112)111 The governor signed this bill into law on May 11, 2006. [[112]](#footnote-113)112 The bill made substantial changes to SB 216 but left the process essentially intact. The statute still directs CWCB to make factual findings on the factors listed in [*C.R.S. section 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). However, the bill deleted three of the factors the CWCB was required to consider under SB 216: (1) the appropriate stream reach required for the intended use, (2) whether there is access for the recreational in-channel use, and (3) such other factors as may be determined appropriate. [[113]](#footnote-114)113

The General Assembly never properly defined term "appropriate stream reach." The term could mean whether the RICD actually covered the reach of the stream with the whitewater park. The CWCB's expertise is not needed for this determination. "Appropriate stream reach" could also mean whether the RICD was in a location which would result in more water exiting the state before it could be consumptively used, but the CWCB addresses this issue in the "utilization of compact entitlements" factor. Thus, this factor was more confusing than useful. Additionally, the issue of access is usually simple and need not be the subject of an administrative proceeding. Finally, the General Assembly deleted the catchall factor which was not consistent with the CWCB's fact-finding role.

The bill added de minimis provisions for whether the RICD would impair maximum utilization, and for whether new diversions would **[\*92]** injure the RICD holder. [[114]](#footnote-115)114 Additionally, when evaluating the application, the statute now directs the water courts to examine each of the factors in [*C.R.S. section 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) including the stream reach and access factors which had been removed from that section. [[115]](#footnote-116)115 In addition, the water court may not issue a decree which would impair the ability of the state to utilize and place to beneficial use its compact entitlements. [[116]](#footnote-117)116

Most importantly, the bill contained two futile call provisions. The first stated that the water court must determine a flow below which water cannot be beneficially used in the whitewater park. [[117]](#footnote-118)117 Presumably, the state engineer may not administer a call by the RICD holder if the streamflow is below this level.

The second futile call provision stated that for any RICD where the sum total of the amount of water appropriated exceeds fifty percent of the historical average streamflow, the state engineer will not administer a call if less than eighty-five percent of the decreed rate of flow for any time period is present in the stream. [[118]](#footnote-119)118 This is an attempt to make RICD appropriators apply for realistic amounts. Since the appropriator can only call when there is between eighty-five and one hundred percent of the amount decreed, the theory is that the appropriator will appropriate only the amount likely to be present. For instance, under the Golden decree, where the city appropriated much more than fifty percent of the historical average streamflow, the town has a decree for 1000 cfs in May. [[119]](#footnote-120)119 Under this futile call provision, Golden would not be able to call unless 850 cfs or more was present in Clear Creek. Clear Creek rarely has a stream flow of 850 cfs in May. [[120]](#footnote-121)120 Under Senate Bill 37, Golden would have had an incentive to get a decree for a smaller amount.

Senate Bill 37 is also notable for what it does not do. It does not give the CWCB findings a greater presumptive weight than they were given by the ***Colorado*** Supreme Court in the Gunnison case. "The water court shall consider all findings of fact made by the ***Colorado*** Water **[\*93]** Conservation Board … regarding a recreational in-channel diversion, which findings shall be presumptive as to such facts, subject to rebuttal by any party. In addition, the water court shall consider evidence and make affirmative findings..." [[121]](#footnote-122)121 Thus, the CWCB findings still carry only the weight of a rebuttable presumption in the water court.

IV. The effect of RICDs -- the Central City decision

Much of the debate surrounding RICDs centers on two assumptions: appropriators will exercise their right to call once they receive a RICD, and RICDs will block future exchanges. All RICDs will have very junior priority dates. In a state as over-appropriated as ***Colorado***, this means that these rights will almost never be in priority. Thus, there will be very few calls from RICD holders.

The more important reason to get a RICD is the right to object to other decrees, specifically exchanges to points of diversion further upstream. However, the scope of this right is unclear. It is possible that a senior right could be exchanged to an upstream diversion with an earlier priority date than the RICD. Because the upstream diversion would be senior to the RICD, it is not clear the RICD holder would be entitled to protection. In ***Colorado*** Water Conservation Board v. City of Central, the ***Colorado*** Supreme Court addressed this issue in the context of CWCB-held instream flows. [[122]](#footnote-123)122

The Central City case arose out of an attempted plan for augmentation on Clear Creek. [[123]](#footnote-124)123 Central City submitted an augmentation plan that involved an exchange of water from senior downstream agricultural rights to diversions far upstream in the North Fork Clear Creek ("NFCC") drainage. [[124]](#footnote-125)124 The CWCB holds an instream flow right on the NFCC for 1.5 cfs. [[125]](#footnote-126)125 The augmentation plan included out-of-priority diversions at three upstream points of diversion with earlier priority dates than the CWCB-held instream flow. [[126]](#footnote-127)126 The CWCB requested that the augmentation plan include a provision forbidding the upstream diversion through these diversions if 1.5 cfs was not available for the instream flow right in the NFCC. [[127]](#footnote-128)127 The water court determined that the CWCB was not entitled to these protective terms. [[128]](#footnote-129)128 The CWCB appealed, arguing the water court should require Central City to replace any out-of-priority diversions which injure its instream flow right. **[\*94]**

To begin its analysis, the ***Colorado*** Supreme Court first noted: "a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation." [[129]](#footnote-130)129 The court then discussed plans for augmentation: "In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others." [[130]](#footnote-131)130 Next, the court addressed the rights associated with instream flows:

Instream flow or lake level rights are no different in concept from other appropriative rights. They must be decreed to be administered; are given a fixed priority date, a specified flow rate or volumetric quantity, time and place of use; and are administered like any other water right, but no means of diversion is required. [[131]](#footnote-132)131

Most importantly, however, the court discussed in detail the legislative intent behind the instream flow statute. It concluded the legislature envisioned a program which would actually achieve the goal of preserving the natural environment to a reasonable degree. "The legislature...envisioned the primary value of an instream flow right to derive from a basic tenet of water law: its ability to preserve the stream conditions existing at the time of its appropriation." [[132]](#footnote-133)132 "Thus, a junior instream flow right may resist all proposed changes in time, place, or use of water from a source which in any way materially injures or adversely affects the decreed minimum flow in the absence of adequate protective conditions in the change of water right or augmentation decree." [[133]](#footnote-134)133

The Central City case did not involve RICDs, nor did it mention them. The Supreme Court's treatment of instream flow rights, however, is very encouraging for RICD holders who intend to assert the no-injury rule. A broad reading of Central City would support the proposition that all decrees come with the same rights, regardless of who holds the decree or the use to which the water will be put. Thus, RICDs would be entitled to the same junior protection as any other water right. It is important, however, to note the weight the court placed on legislative intent. RICDs arise out of an entirely different statutory provision. The RICD legislation was an attempt to limit instream decrees rather than an attempt to achieve environmental protection, as is the case for the instream flow statute. Thus, the legislative intent argument would not be as strong for the no-injury rule for RICDs. **[\*95]**

V. Conclusion

In the last five years, the law of RICDs has grown from non-existent to voluminous. The old obstacles to RICDs -- the diversion requirement and beneficial use -- have vanished but new ones have taken their place. Senate Bill 216 added another layer to the process in the hopes of avoiding unwise RICDs. Senate Bill 37 makes significant changes to the process created in Senate Bill 216, but the primary flaws remain.

First, the CWCB's involvement in the process seems unnecessary. While it appears that the Board has softened its stance somewhat and is now more open to negotiated settlements, their findings still only carry the weight of a rebuttable presumption. The negotiations in the Chaffee County case would have probably taken place with or without the CWCB. The concessions made by the applicant were made to reach a settlement with the many objectors. [[134]](#footnote-135)134 The CWCB's blessing is nice for the applicant, but given the weight of their findings, it is hardly necessary. It would be faster, easier, and cheaper to remove the CWCB from the process and place the burden for each factor on the applicant in the water court.

Second, neither the legislature nor the courts have defined beneficial use in the RICD context in any meaningful way. Most attempts to do so have focused on the level of boater that the whitewater park caters to. This approach is flawed. Whitewater parks are easy and safe places to paddle. Any boater with even basic skills prefers a high water level. [[135]](#footnote-136)135 Whitewater parks are like many other recreational activities in that substitutes are available. At the peak of runoff, many ***rivers*** have good flows, so a whitewater park will have to have a very good water level to attract boaters. Toward the end of the runoff season, there are fewer other options, so a marginal water level may still be good enough to attract boaters. The primary purpose of these parks is to attract people. Thus the amount of water that can be put to beneficial use should be the flow needed at any given time of year to attract boaters.

Finally, it is unclear whether a RICD carries with it the junior protection rights generally associated with a decree in ***Colorado***. Senate Bill 37 attempts, through its two futile call provisions, to limit the amounts decreed by limiting when a call can be made. This ignores the reality that the ability to call is not the primary reason for a RICD. ***Colorado*** is an over-appropriated state. The primary reason for an RICD is protection from future upstream diversions and exchanges. In fact, Senate Bill 37 specifically contemplates RICD holders objecting to **[\*96]** future appropriations and changes. [[136]](#footnote-137)136 One can read Central City to extend junior protection to all instream decrees. However, the scope of junior protection for RICDs will not be completely clear until the ***Colorado*** Supreme Court specifically addresses the issue.

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3. 3 [***Colo.******River*** *Water Conservation Dist. v. Rocky Mountain Power* ***Co****., 406 P.2d 798, 800 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-4)
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66. 66 Id. (statements of Senator Matsunaka). [↑](#footnote-ref-67)
67. 67 Summarized History for Bill Number SB01-216 (2001), available at [*http://www.leg.state.****co****.us/2001/inetcbill.nsf/Frameset?ReadForm&viewname=2&resultformat=1*](http://www.leg.state.co.us/2001/inetcbill.nsf/Frameset?ReadForm&viewname=2&resultformat=1) (Follow SB01-196 to SCR01-002 hyperlink, then find SB01-216 and follow History hyperlink). [↑](#footnote-ref-68)
68. 68 [***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-69)
69. 69 Id. [↑](#footnote-ref-70)
70. 70 Findings and Recommendations of the ***Colo.*** Water Conservation Board to the Water Court, In re Application for Water Rights of Upper Gunnison ***River*** Water Conservancy Dist., No. 02CW38 (***Colo.*** Dist. Ct., Water Div. No. 4, 2002). [↑](#footnote-ref-71)
71. 71 [*Upper Gunnison* ***River*** *Water Conservancy Dist., 109 P.3d at 589.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-72)
72. 72 [*Id. at 590.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-73)
73. 73 Id. [↑](#footnote-ref-74)
74. 74 Id. [↑](#footnote-ref-75)
75. 75 Id. [↑](#footnote-ref-76)
76. 76 [*Id. at 593.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-77)
77. 77 [*Id. at 594.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 [*Id. at 596.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-79)
79. 79 [*Id. at 597.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-80)
80. 80 Id. [↑](#footnote-ref-81)
81. 81 Id. [↑](#footnote-ref-82)
82. 82 Id. [↑](#footnote-ref-83)
83. 83 [*Id at 598-99.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-84)
84. 84 [*Id. at 599.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-85)
85. 85 [*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-86)
86. 86 Application for Surface Water Rights, In re Application of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. No. 2, 2004), available at [*http://cwcb.state.****co****.us/WaterSupply/RICDPendApps.htm*](http://cwcb.state.co.us/WaterSupply/RICDPendApps.htm) (follow "Application of Chaffee County" hyperlink). [↑](#footnote-ref-87)
87. 87 CWCB, Staff's Recommended Findings of Fact and Recommendation, [*http://cwcb.state.****co****.us/WaterSupply/RICDPendApps.htm*](http://cwcb.state.co.us/WaterSupply/RICDPendApps.htm) (follow "Application of Chaffee County" hyperlink) (last visited Oct. 2, 2006). [↑](#footnote-ref-88)
88. 88 Id. [↑](#footnote-ref-89)
89. 89 Id. [↑](#footnote-ref-90)
90. 90 Memorandum from Ted Kowalski, RICD program manager to the CWCB, at [*http://cwcb.state.****co****.us/Board/Agendas/2006/March06/19.pdf*](http://cwcb.state.co.us/Board/Agendas/2006/March06/19.pdf) (last visited Jan. 9, 2007). [↑](#footnote-ref-91)
91. 91 Id. [↑](#footnote-ref-92)
92. 92 See Finding of Fact and Recommendations of the ***Colorado*** Water Conservation Board to the Water Court, In re Application of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. No. 2, 2004), available at [*http://cwcb.state.****co****.us/WaterSupply/RICDPendApps.htm*](http://cwcb.state.co.us/WaterSupply/RICDPendApps.htm) (follow "Application of Chaffee County" hyperlink). [↑](#footnote-ref-93)
93. 93 Findings of Fact, Conclusions of Law, and Decree of the Court, Application of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. No. 2, 2004), at 4 [hereinafter Chaffee County decree], available at [*http://cwcb.state.****co****.us/WaterSupply/RICD/Chaffeefinaldecree.PDF*](http://cwcb.state.co.us/WaterSupply/RICD/Chaffeefinaldecree.PDF). [↑](#footnote-ref-94)
94. 94 Id, at 4-5. [↑](#footnote-ref-95)
95. 95 Id at 5. [↑](#footnote-ref-96)
96. 96 Id. [↑](#footnote-ref-97)
97. 97 Id. [↑](#footnote-ref-98)
98. 98 Id, at 5-6. For a more detailed explanation of "Recovery Years", see id, at Ex. C, Memorandum of Understanding for Settlement of 04CW129, Water Division 2, at 3. [↑](#footnote-ref-99)
99. 99 For a list of "Limited Future Exchanges" included in the final application, see id, Ex. C, at 4-6. [↑](#footnote-ref-100)
100. 100 Finding of Fact and Recommendations of the ***Colorado*** Water Conservation Board to the Water Court, In re Application of Chaffee County, No. 04CW129 (***Colo.*** Dist. Ct., Water Div. No. 2, 2004), available at [*http://cwcb.state.****co****.us/WaterSupply/RICDPendApps.htm*](http://cwcb.state.co.us/WaterSupply/RICDPendApps.htm) (follow "Application of Chaffee County" hyperlink). [↑](#footnote-ref-101)
101. 101 Id. [↑](#footnote-ref-102)
102. 102 Chaffee County decree, supra note 94. [↑](#footnote-ref-103)
103. 103 ***Colorado*** Water Conservation Board, Mission and Strategic Plan, available at [*http://cwcb.state.****co****.us/missionandstrategic.htm*](http://cwcb.state.co.us/missionandstrategic.htm) (last visited Oct. 3, 2006). [↑](#footnote-ref-104)
104. 104 See [*Aspen Wilderness Workshop, Inc. v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1253 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-105)
105. 105 See [*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) [↑](#footnote-ref-106)
106. 106 Hearing on S.B. 01-216 before the S. Comm. on Public Policy and Planning, 63rd Gen. Assem., 1st Reg. Sess.(***Colo.***, April 12, 2001)(statements of Steve Bushong)(on file with ***Colorado*** State Archives). [↑](#footnote-ref-107)
107. 107 ***Colorado*** Faces New Challenges - Recreational Instream Flows, IN STREAM ***COLORADO*** (***Colo.*** Water ***Colorado***'s Stream and Lake Protection Program, Denver, ***CO***), January, 2001. [↑](#footnote-ref-108)
108. 108 [***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-109)
109. 109 S.B. 05-062, 65th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2005) available at [*http://www.leg.state.****co****.us/Clics2005a/csl.nsf/fsbillcont3/057E10AFD107CBA587256F5D00809BA7?Open&file=062eng.pdf*](http://www.leg.state.co.us/Clics2005a/csl.nsf/fsbillcont3/057E10AFD107CBA587256F5D00809BA7?Open&file=062eng.pdf). [↑](#footnote-ref-110)
110. 110 Summarized History for S.B. 05-062, 65th Gen. Assemb., 1st Reg. Sess. (***Colo.*** 2005), available at [*http://www.leg.state.****co****.us/Clics2005a/csl.nsf/BillFoldersSenate?openFrameset*](http://www.leg.state.co.us/Clics2005a/csl.nsf/BillFoldersSenate?openFrameset). [↑](#footnote-ref-111)
111. 111 S.B. 06-037, 65th Gen. Assem., 2d Reg. Sess. (***Colo.*** 2006) (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), -305(13)). [↑](#footnote-ref-112)
112. 112 Summarized History for S.B. 06-037, 65th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2006), available at [*http://www.leg.state.****co****.us/Clics2006a/csl.nsf/BillFoldersSenate?OpenFrameSet*](http://www.leg.state.co.us/Clics2006a/csl.nsf/BillFoldersSenate?OpenFrameSet). [↑](#footnote-ref-113)
113. 113 S.B. 06-037, 65th Gen. Assem., 2d Reg. Sess. (***Colo.*** 2006) (codified at § 37-92-102(6)(b)). [↑](#footnote-ref-114)
114. 114 Id. § § 1-2 (codified at § § 37-92-102(6)(b)(I), -103(10.3) (2006)). [↑](#footnote-ref-115)
115. 115 Id. § 3 (codified at § 37-92-305(13)(a)). [↑](#footnote-ref-116)
116. 116 Id. (codified at § 37-92-305(13)(c)). [↑](#footnote-ref-117)
117. 117 Id. (codified at § 37-92-305(13)(d)). [↑](#footnote-ref-118)
118. 118 Id. (codified at § 37-92-305(13)(f)). [↑](#footnote-ref-119)
119. 119 In re Application for Water Rights of Golden, No. 98CW448, 7 (***Colo.*** Dist. Ct., Water Div. No. 1, 2001), available at [*http://www.courts.state.****co****.us/supct/watercourts/wat-div1/ordergolden.htm*](http://www.courts.state.co.us/supct/watercourts/wat-div1/ordergolden.htm). This example presumes that the conditional amount in the decree will become absolute during some high-water year in the future. [↑](#footnote-ref-120)
120. 120 US Geological Survey, USGS Surface- Water Monthly Statistics for ***Colorado***: USGS 06719505 Clear Creek at Golden, ***Colo.***, [*http://waterdata.usgs.gov/****co****/nwis/monthly/?searchsiteno=06719505&agencycd=USGS&referredmodule=sw&format=sitesselectionlinks*](http://waterdata.usgs.gov/co/nwis/monthly/?searchsiteno=06719505&agencycd=USGS&referredmodule=sw&format=sitesselectionlinks) (click Checkbox and Submit) (last visited Sept. 9, 2006). [↑](#footnote-ref-121)
121. 121 S.B. 06-037, 65th Gen. Assem., 2d Reg. Sess. (***Colo.*** 2006) (codified at § 37-92-305(13)(a)). [↑](#footnote-ref-122)
122. 122 [***Colorado*** *Water Conservation Bd. v. City of Central, 125 P.3d 424 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-123)
123. 123 [*Id. at 428.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-124)
124. 124 Id. [↑](#footnote-ref-125)
125. 125 [*Id. at 429.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-126)
126. 126 Id. [↑](#footnote-ref-127)
127. 127 [*Id. at 430.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-128)
128. 128 [*Id. at 433.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-129)
129. 129 [*Id. at 434.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-130)
130. 130 [*Id. at 437.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-131)
131. 131 [*Id. at 437-38.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-132)
132. 132 [*Id. at 439*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-133)
133. 133 [*Id. at 440.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4HNY-2S60-0039-43MS-00000-00&context=1516831) [↑](#footnote-ref-134)
134. 134 See Memorandum, supra note 91. [↑](#footnote-ref-135)
135. 135 These are personal observations which were made based on the author's 10 years of kayaking experience. [↑](#footnote-ref-136)
136. 136 S.B. 06-037, 65th Gen. Assemb., 2d Reg. Sess. (***Colo.*** 2006) (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)). The reference to future injury appears in the de minimis provision for injury from future appropriations. [↑](#footnote-ref-137)