

# [***ARTICLE: WATER ORGANIZATIONS IN COLORADO: A FIRST LOOK INTO WATER ORGANIZATIONS' CONTROL OF AGRICULTURAL WATER RIGHTS AND THEIR TRANSFER POTENTIAL IN THE COLORADO RIVER BASIN***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:552C-91H0-00SW-500F-00000-00&context=1516831)

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SUMMARY

A complex and robust system for protecting water rights for agricultural uses has evolved in ***Colorado*** since the state's earliest days. Water management organizations ("water organizations"), such as irrigation and water conservancy districts, have played not only an integral but equally complex role in protecting irrigation rights throughout ***Colorado***'s history. Estimated at eighty-five to eighty-nine percent of the total water diverted and consumed in the state, agricultural water use is still dominant in ***Colorado***. [[1]](#footnote-2)1 With agricultural water rights generally the most "senior" in ***Colorado***, municipal and industrial entities will increasingly look to agriculture for water. [[2]](#footnote-3)2 This article identifies the legal and political sources and issues to consult concerning the role that water entities play in controlling and transferring "agricultural water" in ***Colorado***. This article's goal is to assist the analysis of the implications of constraints on water rights transfers in ***Colorado*** for the establishment of a water banking scheme among ***Colorado*** ***River*** basin states in the event of longer-term shortages throughout the basin. As political subdivisions of the state, and with laws conferring seemingly uncompromising in-basin retention provisions, water organizations are powerful in ***Colorado***. However, ***Colorado***'s role as the major headwaters state and its "trans-mountain" dynamics have combined to preclude a total prohibition on transfers within or from the state. Nonetheless, water entities in ***Colorado*** - particularly water conservancy districts - likely play a larger counterbalancing role than realized in keeping agricultural water in-basin, and therefore warrant closer investigation.

**Text**

**[\*32]**

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

Some of ***Colorado***'s earliest non-indigenous settlers moved to ***Colorado*** to take advantage of the 1862 Homestead Act, which allotted land to settlers for five-year periods for agriculture. [[3]](#footnote-4)3 Despite extremely arid conditions, settlers used water not only for agricultural crops but also livestock grazing in pastureland and woodland. [[4]](#footnote-5)4 The 1860s marked the beginning of the "ditch-building" era, which saw the formation of the state's first water organizations by farmers and ranchers. They were joint ditches **[\*33]** and ditch companies, which were small and generally upstream to take advantage of first flows. [[5]](#footnote-6)5 Groups of users formed mutual ditch companies ("MDCs") to share labor and costs of acquiring and conveying water. [[6]](#footnote-7)6 Agricultural development in the face of water scarcity and uncertainty helped propel prior appropriation as the legal system for regulating water in ***Colorado***. [[7]](#footnote-8)7 The Constitution also gave water for domestic purpose higher preference than any other purpose; however, agricultural purposes were specifically preferred over manufacturing purposes.8 The Constitution also gave "agricultural purposes" priority for water over manufacturing purposes in ***Colorado***, second only to domestic purposes. [[8]](#footnote-9)8

Government entities with taxing power took over water development from some of the MDCs when water development became too costly. [[9]](#footnote-10)9 Nevertheless, MDCs grew in number after the ***Colorado*** Constitution exempted the ditches, canals, and associated works that they owned from state property taxation. [[10]](#footnote-11)10 MDCs also provided a cheap, flexible, cooperative solution to irrigation development when many capitalistic water enterprises failed. [[11]](#footnote-12)11 John Wesley Powell, a former director of the U.S. Geological Survey, conservationist, and explorer of the ***Colorado*** ***River***, [[12]](#footnote-13)12 supported enlisting the national government on behalf of farmers to prevent corporate monopolies from forming in the late 19th century. [[13]](#footnote-14)13 Powell's policies led to the formation of the first irrigation districts. [[14]](#footnote-15)14 Irrigation **[\*34]** companies formed to allow landowners to provide for irrigation and drainage of district lands as necessary to maintain their irrigability. [[15]](#footnote-16)15 With the ability to tax and bond irrigable land, landowners also formed irrigation districts and water users' associations to sponsor the first federal projects that the federal government authorized under the 1902 Reclamation Act. [[16]](#footnote-17)16

In 1937, water conservation districts [[17]](#footnote-18)17 ("conservation districts") and water conservancy districts [[18]](#footnote-19)18 ("conservancy districts") added the authority to tax all land within district boundaries; this included non-irrigable as well as potentially irrigable land and urban as well as agricultural land. [[19]](#footnote-20)19 Conservation and conservancy districts provided the perfect vehicle for taking advantage of the 1902 Reclamation Act, which required the Bureau to contract with local entities for sponsorship and repayment of federal water projects because they had broad power to receive public funds. [[20]](#footnote-21)20 The **[\*35]** Water Conservancy Act ("the Act") made it state policy to conserve the water resources of ***Colorado*** for the "greatest beneficial use of water within" the state by "directly benefiting lands to be irrigated from works to be constructed." [[21]](#footnote-22)21 It was also state policy "to obtain from water originating in ***Colorado*** the highest duty for domestic uses and irrigation of lands in ***Colorado*** within the terms of interstate compacts." [[22]](#footnote-23)22 Notably, the Act gave districts the ability - at least on paper - to block all sales within their boundaries. [[23]](#footnote-24)23

The two major water districts formed that year were also created in response to politics. [[24]](#footnote-25)24 The ***Colorado*** Supreme Court case Coffin v. Left Hand Ditch ***Co***. affirmed prior appropriation and gave the state unbridled authority to transfer water across water "districts," basins, or even broader "divisions" outside the basin of origin. [[25]](#footnote-26)25 Thus, the Act and formation of the Northern ***Colorado*** Water Conservancy District and the ***Colorado*** ***River*** District represented the state's first attempts to grapple with the implications of transfers and circumscribe them; subsequently, opponents mounted a series of constitutional and other legal challenges to water conservancy districts after the 1937 Act. [[26]](#footnote-27)26 But, very few of the challenges were successful. [[27]](#footnote-28)27 Despite the legal challenges, the legislature **[\*36]** has repeatedly given the organizations the authority to actively participate in water projects in ***Colorado***. [[28]](#footnote-29)28 The State also created the ***Colorado*** Water Conservation Board ("CWCB") in 1937 ; the first agency to protect and develop water for Coloradans on a state-wide basis. [[29]](#footnote-30)29

Today, especially since the 2002 drought, the state government plays a larger role with respect to water planning and delivery. [[30]](#footnote-31)30 The CWCB is leading the charge on "water policy," and the conservancy districts' roles are increasingly tied to conservation and development of water for community uses - much in line with Powell's original vision. [[31]](#footnote-32)31 Joint ditches and MDCs collectively comprise a significant share of agricultural water rights in ***Colorado***. [[32]](#footnote-33)32 But conservancy districts also comprise a significant share of agricultural water rights in ***Colorado*** and generally enjoy broader and more cohesive political, legal, and economic power for which water rights data is more readily available. [[33]](#footnote-34)33 It is difficult to say what proportion of ***Colorado***'s agricultural water conservancy and conservation districts control today, but totals for water districts can be tallied for each division and cross-referenced with CDSS data for rough estimates. [[34]](#footnote-35)34 Therefore, this discussion will primarily focus on the role of water conservancy districts in understanding agricultural water transfers in ***Colorado***.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). PHYSICAL AND LEGAL ORGANIZATION OF IRRIGATION WATER IN ***COLORADO*** IN THE ***COLORADO*** ***RIVER*** BASIN

A. Water divisions

Although Powell failed in his ultimate vision of "watershed commonwealths," i.e. making watersheds the basis for political units in Western states, ***Colorado*** realized his vision of local water districts consisting of "divisions", as organizational units,. [[35]](#footnote-36)35 Under the sweeping Water Rights Determination and Administration Act of 1969 (the "1969 Act"), ***Colorado*** divided the state into seven major divisions according to the seven major ***river*** drainages they represent. [[36]](#footnote-37)36. [[37]](#footnote-38)37 The state appoints a division **[\*37]** engineer to each division. [[38]](#footnote-39)38 The state and division engineers also regulate the distribution of water according to the priorities and quantities decreed by water courts. [[39]](#footnote-40)39 "Water judges" are selected from among district court judges in each division. "Water courts" within each division have jurisdiction over water rights adjudications. [[40]](#footnote-41)40

B. Water districts

Water districts simply represent the smaller tributary basins within each of the seven water divisions for water rights administration. [[41]](#footnote-42)41 Water commissioners are responsible for administering water rights for each of the districts under the lead of the division engineer. [[42]](#footnote-43)42

C. Water organization boundaries

Water organizations are typically also divided into "divisions" (not to be confused with state-administered divisions), which are political subunits. [[43]](#footnote-44)43 Because water organizations' boundaries are based on historical resident land ownership rather than watershed boundaries, they do not normally correlate with state-designated "divisions." Still, there is strong language in water organizations' bylaws for maintaining water within the district's boundaries. [[44]](#footnote-45)44

**[\*38]**

D. Water rights adjudication in ***Colorado***

The Water Conservancy Act, together with a water organization's rules and policies, largely dictate a water organization's control of agricultural water. [[45]](#footnote-46)45 An understanding of the legal scope of the water rights, themselves, is critical to understanding the meaning of "transfers" in ***Colorado***, and therefore to understanding the complete scope of potential restrictions on transfers in terms of organizations. The most recent data show that ***Colorado*** has easily exceeded the rest of the West in annual agricultural to municipal transfers since 1990, but the ***Colorado*** Big-Thompson project comprises a vast majority of these transfers. [[46]](#footnote-47)46

Unlike all other prior appropriation states, which created separate administrative agencies with permitting and regulatory authority, ***Colorado*** determines its water rights through the court system. [[47]](#footnote-48)47 ***Colorado*** charges its judicial system with administrative functions to "adjudicate" water rights. [[48]](#footnote-49)48 Water rights in ***Colorado*** are also only valid to the extent that they meet a number of conditions that have evolved under statutory and case law. Before a water right can be considered an "agricultural" or "irrigation" water right, there must be a valid acquisition that, usually, but not always, entails diversion, beneficial use, [[49]](#footnote-50)49 and proper initiation of priority for a valid priority date. [[50]](#footnote-51)50 In particular, agricultural water rights must also conform to the "duty of water," a limit on the volume or rate of water use on an acre of land based on a presumption of the maximum quantity or rate of flow required in the area. [[51]](#footnote-52)51 The "duty of water" varies by state, ranging from one cubic foot per second for every fifty acres in Idaho to one cubic foot per second for every seventy acres in Wyoming and Nebraska. [[52]](#footnote-53)52 ***Colorado***'s duty of water, one cubic foot per second for every forty acres, [[53]](#footnote-54)53 is undemanding but not far from other states' standards for limiting agricultural water to only the extent needed. [[54]](#footnote-55)54 Over the last three **[\*39]** decades, ***Colorado*** courts have also added the statutory "anti-speculation" [[55]](#footnote-56)55 and "can and will" [[56]](#footnote-57)56 doctrines to appropriation requirements, making it increasingly difficult for cities to develop water supplies without meeting certain long-range planning criteria. [[57]](#footnote-58)57

As a prior appropriation state, ***Colorado*** transfers priority dates with the water rights. [[58]](#footnote-59)58 But water transfers are only valid to the extent that they meet the state's relatively demanding legal standards of transfers. [[59]](#footnote-60)59 "Transfers" are one type of "change" under ***Colorado*** water law, which can range from change in point of diversion, place of use, purpose of use, and timing of use. [[60]](#footnote-61)60 Although all changes require rigorous standards, since transfers entail not only change in the water rights owner but usually implicate most other change types, extra-basin transfers are difficult in theory. Water organizations may also include restrictions on transfers in their by-laws and policies, as will be discussed below. While this study focuses on transfers external to water organization districts, it also alludes to intra-district transfers where relevant for an organization.

Users may transfer water rights by sale, lease, or exchange. [[61]](#footnote-62)61 Since water is severable from the land in ***Colorado***, new uses may not exceed the quantity of rights held by the transferor, thus preventing harm to existing appropriators. [[62]](#footnote-63)62 Most significantly for agricultural water transfers, the transferee, if successful in all other respects, may only transfer the amount of water for the new use based on the amount that the old use historically consumed, rather than the amount actually diverted or even initially decreed. [[63]](#footnote-64)63 Therefore, change applications require calculation of the change in terms of the amount a crop historically consumes, which in the case of crops is calculated as an average of fifty percent. [[64]](#footnote-65)64

**[\*40]** Besides quantity transferred, ***Colorado*** courts have factored other considerations into determining "no harm" to other existing appropriators, including the right to "continuation of stream conditions as they existed at the time of their respective appropriations." [[65]](#footnote-66)65 These stream conditions include return flows in terms of the time, amount, and location that the transferor used the rights. [[66]](#footnote-67)66 One must also factor in the season of use as well as the care of formerly irrigated land under the "area-of-origin" statute. [[67]](#footnote-68)67 Although ***Colorado***, unlike many other Western states, has no "public interest" or "public trust" doctrine to contest transfers on the basis of environmental, economic, or social grounds, ***Colorado*** courts are increasingly adding conditions to transfers in the name of public welfare. [[68]](#footnote-69)68 The "anti-speculation" doctrine now applies to change cases. [[69]](#footnote-70)69 Moreover, the most recent ***Colorado*** supreme court anti-speculation ruling narrowed the anti-speculation "exception" for municipalities in developing water supplies by requiring "reasonable planning periods," etc. [[70]](#footnote-71)70

Because so many change issues involve agricultural-to-urban transfers, and because these types of transfers can potentially impact every downstream user on the stream, transaction costs of going to court over agricultural water transfers can be incredibly high. [[71]](#footnote-72)71 The most obvious evidence for change case law acting as a barrier to transfers is that users often import "foreign" (i.e. from a different basin) agricultural water for municipal use rather than changing agricultural water in-basin to municipal use. [[72]](#footnote-73)72 Because "foreign" or "imported" water is not subject to water court adjudication and, therefore, not subject to change case standards, "trans-basin" (and often, "trans-mountain") laws generally permit the diversions. [[73]](#footnote-74)73 Trans-basin diversions often involve agricultural-to-urban or agricultural-to agricultural changes, and are increasingly subject to state and federal restrictions, [[74]](#footnote-75)74 as raised in Section IV, supra.

**[\*41]** Such potentially high transfer costs have obvious ramifications for discouraging large agricultural-to-municipal transfers, as well as discouraging large mineral development, such as oil shale development. [[75]](#footnote-76)75 Despite legal and economic costs associated with water transfers, they are usually still more cost-effective than water augmentation options. [[76]](#footnote-77)76 Although many water basins are already at or near their development capacity or too remote to be economically attractive, waters from the Upper ***Colorado***, the Gunnison, and the South Platte are targets for additional development. [[77]](#footnote-78)77 Perhaps ironically, the success of ***Colorado*** water law in protecting and responding to the needs of agriculture has played a large role in not only strengthening the state's economy, but increasing the overall flexibility of the legal system, including water transfers. [[78]](#footnote-79)78

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

A. Nomenclature and background

As described above, water organizations arose in ***Colorado*** as a means for neighboring landowners to pool resources, in a collective effort to convey water to locations often distant from the source. [[79]](#footnote-80)79 There are five major water organization types in ***Colorado***: conservation districts, conservancy districts, irrigation districts, ditch companies, and water users' associations. In ***Colorado***, conservation and conservancy districts largely perform the function that irrigation districts fulfill in other western states [[80]](#footnote-81)80 and are, therefore, the focus of this study. Mutual ditch companies, numbering in the thousands, collectively play a larger role politically than in most other western states and also fulfill some of the functions of earlier irrigation districts. [[81]](#footnote-82)81 Conservancy districts have also largely supplanted ***Colorado***'s earlier "water users' associations," which fulfilled roles **[\*42]** similar to irrigation districts but now tend to be more loosely formed advocacy-type groups. [[82]](#footnote-83)82

Historically, ***Colorado*** has organized totals for agricultural water (i.e. irrigable area) according to individual conveyance structures, such as ditches, or use type, [[83]](#footnote-84)83 and even this type of organization appears to be fairly recent. Experts have likely found it difficult to organize irrigable area by water organization, not just because of the challenges of quantifying irrigable area, but because of the organizations' widely-varying powers. The functions organizations perform, e.g. acting as wholesalers, as deliverer-suppliers, or as policy-makers, can also dictate the extent to which organizations have the power to transfer water. [[84]](#footnote-85)84 For example, The Northern District acts as more of a wholesaler, delivering an average of 220,000 acre feet per year of agricultural water to its constituents, [[85]](#footnote-86)85 while other organizations play more of a direct delivery role, such as the Tri-County Water Conservancy District. [[86]](#footnote-87)86 Others still, such as the Upper Gunnison Water Conservancy District, play more of a policy-making role. [[87]](#footnote-88)87

There is no set legal "organizational hierarchy" among water organizations, e.g. conservation districts do not control the water rights holdings of conservancy or irrigation districts within their borders. [[88]](#footnote-89)88 However, water organizations seem to be endowed with progressively more robust legal and political powers, from water users' associations "up" through conservation districts. For example, conservancy districts are empowered to contract with other water organizations (mutual ditch companies and water associations, e.g.) and other private corporations for the sale of water, as authorized by conservancy district boards. [[89]](#footnote-90)89 Conservation districts have broader eminent domain powers than conservancy districts, and conservancy districts have broader taxing authority over their constituents than irrigation districts. [[90]](#footnote-91)90 Irrigation districts can exert some control **[\*43]** over water users' associations. [[91]](#footnote-92)91 The extent to which these power distinctions impact water rights transfers from within and between specific water organizations is unclear but could be the focus of future investigation.

1. Water conservation districts

***Colorado*** created conservation districts under the Water Conservancy Act, C.R.S. [*§ 37-45-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2M9-00000-00&context=1516831), with separate articles for each of the districts: the ***Colorado*** ***River*** Water Conservation District (the "***River*** District"), the Southwestern Water Conservation District, the Republican ***River*** Water Conservation District, and the Rio Grande Water Conservation District. Both conservation and conservancy districts become political and public corporate subdivisions of the state upon creation, with general and special assessment bond-issuing powers. [[92]](#footnote-93)92 Conservation districts, like conservancy districts, have historically been, and continue to be, associated with agricultural interests in particular, although mandated to protect and develop a number of uses - agriculture, domestic, mining, recreation, fish and wildlife. [[93]](#footnote-94)93 Conservation districts are generally established in response to specific water project needs. [[94]](#footnote-95)94 They may file for water rights and initiate appropriations for the use and benefit of the ultimate appropriators. [[95]](#footnote-96)95 They may also, as described above, contract with federal agencies for the construction and repayment of water works. [[96]](#footnote-97)96

There are only four conservation districts in ***Colorado*** and only two in the ***Colorado*** ***River*** basin, the ***River*** District, described infra, and the Southwestern Water Conservation District. They are both more "regional" in nature than their conservancy district counterparts and exist to protect the interests of their constituent water user. [[97]](#footnote-98)97 Therefore, they tend to be involved more in policy than in building their own projects or acting as water suppliers. [[98]](#footnote-99)98 Conservation districts have broad practical powers over wide geographic areas, [[99]](#footnote-100)99 with the authority to construct reservoirs, ditches, **[\*44]** and other conveyance structures to promote the health and general welfare of their districts and that of the state. [[100]](#footnote-101)100 The general legislative powers circumscribing the ***River*** District and Southwestern do not differ substantially, charging both with the responsibility for protecting and developing ***Colorado***'s compact entitlements for Coloradans, in addition to in-district water conservation, use, and development. [[101]](#footnote-102)101

Conservation districts are governed by a board of directors whose members are appointed for three-year terms by the boards of county commissioners from each county through majority voting. [[102]](#footnote-103)102 Unlike conservancy districts, conservation districts are created by legislative action, have broader powers of eminent domain, and can contract with public and private entities in joint ventures. [[103]](#footnote-104)103 Conservation districts also raise their funds through ad valorem taxes on district property whereas conservancy districts primarily raise revenue through district mill levies. [[104]](#footnote-105)104

B. Transfers under water conservation districts: general principles

Most conservation and conservancy districts tend to sell or lease water from larger projects to their constituents through allotment contracts, which circumscribe rules for transfers. [[105]](#footnote-106)105 Allotment contracts can provide greater flexibility for the end-user, sometimes obviating the need for water court altogether. [[106]](#footnote-107)106 But, the flexibility of water allotment contracts - and thus their implications for water rights transfer potential - still depend on a number of factors specific to the contract, in addition to legal and political factors. [[107]](#footnote-108)107

1. Water conservancy districts

There are reports of between 46 and 51 conservancy districts in ***Colorado***, but ***Colorado***'s list of recreated conservancy districts in the Water Conservancy Act contains forty-six conservancy districts, including two subdistricts. [[108]](#footnote-109)108 Conservancy districts were also established to finance and construct waterworks for a number of uses, most predominantly agriculture. [[109]](#footnote-110)109 **[\*45]** Conservancy districts also stabilize and increase flows and returns flows as needed for their constituents. [[110]](#footnote-111)110 As described above, there is little legally distinguishing conservancy districts from conservation districts, but they are likely often confused because many conservancy districts such as Northern and the Southeastern ***Colorado*** Water Conservancy District ("Southeastern") act in such a "regional" capacity. [[111]](#footnote-112)111 Conservancy districts also build their own projects, with Northern's ***Colorado***-Big Thompson project with Reclamation the most notable water project in ***Colorado***. [[112]](#footnote-113)112 Conservancy districts are also generally established on the basic of specific water projects, and then their mandates may expand. [[113]](#footnote-114)113

Conservancy districts are distinguishable from other water organizations in terms of their formation and governance. Unlike conservation and irrigation districts, the boundaries of conservancy districts are established through citizen-petition and are legally created through judicial action in district court. [[114]](#footnote-115)114 District courts appoint conservancy district boards unless constituents opt for elections. [[115]](#footnote-116)115 However, the courts are only involved in conservancy district activities at district formation and during disputes; boards are otherwise largely in control of all conservancy district actions. [[116]](#footnote-117)116 Approval of districts by court decree establish conservancy districts as political and corporate state subdivisions with all the powers of a public or municipal corporation, like conservation districts. [[117]](#footnote-118)117

Boards consist of a maximum of fifteen people, all of whom must reside in the district, own land, and be knowledgeable about water. [[118]](#footnote-119)118 Boards have the power to establish by-laws and rules to carry out the district's objectives. [[119]](#footnote-120)119 Conservancy districts can levy four classes of tax assessments. [[120]](#footnote-121)120 They also generate revenue through sale or leasing of water by contract and bonding. [[121]](#footnote-122)121

Conservancy districts are endowed with the same broad powers as conservation districts to appropriate, sell, lease, and use water, water rights and all personal property of any kind within and outside of the district. [[122]](#footnote-123)122 **[\*46]** They can contract with the federal government for reclamation and other development projects. [[123]](#footnote-124)123 They can use eminent domain to achieve any district purposes except to control water rights intended for trans-mountain diversion. [[124]](#footnote-125)124

As with conservation districts, most conservancy districts tend to sell or lease water from larger projects to their constituents through allotment contracts, which circumscribe rules for transfers. [[125]](#footnote-126)125 Conservancy boards have the power to approve and enforce all allotment contracts, including the power to withhold water for delinquent payment, and to declare forfeiture of rights upon breach of contract. [[126]](#footnote-127)126 Conservancy districts also have the power to allocate and reallocate water within the district. [[127]](#footnote-128)127 The conservancy district board must usually approve transfer of allotment contracts. [[128]](#footnote-129)128 While transfers are usually approved, no one has a legal right to obtain the board's approval of a transfer. [[129]](#footnote-130)129 Unlike any other water organization type, conservancy districts are subject to a unique mitigation requirement when exporting water from the ***Colorado*** ***River*** basin from one of their districts. [[130]](#footnote-131)130 While the extent to which this provision in combination with other sections of this article limits transfers, recent courts have ruled that extra-district use is "not per se impermissible." [[131]](#footnote-132)131 As with conservation districts, whether or not conservancy districts manage their water rights through allotment contracts, there are additional legal and political factors that can affect transfers, as discussed below.

2. Irrigation districts

Irrigation districts were first codified under ***Colorado*** law in 1905, and there are currently sixteen of them in the state. [[132]](#footnote-133)132 Older irrigation **[\*47]** districts legislatively formed in 1921 and earlier are referred to as Article 41 and Article 42 irrigation districts. [[133]](#footnote-134)133 All irrigation districts, including those formed after 1921, are now subject to provisions of Article 43 of Title 37. [[134]](#footnote-135)134 The purpose of irrigation districts is to maintain the irrigability of land by providing necessary irrigation and drainage. [[135]](#footnote-136)135

Irrigation districts are formed through landowner petitions to the board of county commissioners for the county containing most of the district, and voted on by qualified electors within the proposed district. [[136]](#footnote-137)136 The districts are governed by a three-to-five member board of directors representing their respective divisions of the district. [[137]](#footnote-138)137 The state's legislative authority for the rules and management of irrigation districts is much more exhaustive than that for conservation and conservancy districts, but the board may still adopt its own rules for determining water distribution in the district. [[138]](#footnote-139)138

In addition to a much narrower mandate than for conservation and conservancy districts, irrigation districts cannot levy general taxes unlike the other district types. [[139]](#footnote-140)139 Therefore, irrigation districts are not considered government entities for the purposes of the ***Colorado*** constitution. [[140]](#footnote-141)140 Special tax levies are only assessed on lands suitable or capable for irrigation. [[141]](#footnote-142)141 The levies also fund the bonds and repayment for federal irrigation projects. [[142]](#footnote-143)142 Boards may also sell bonds to fund the construction or purchase of waterworks and water rights. [[143]](#footnote-144)143

3. Ditch Companies

i. Joint Ditches

A joint or common ditch is simply a water transport ditch used by two or more parties, and not a company, per se, and a precursor to the ditch companies, described below. [[144]](#footnote-145)144 Ditch ownership rights are "real property rights that may be conveyed or reserved separately from the land or water rights associated with the ditch." [[145]](#footnote-146)145 In the absence of any contract, users own the ditch as tenants in common with all the relevant rights and liabilities of such ***co***-ownership. [[146]](#footnote-147)146

**[\*48]** Joint ditches were the first unofficial water organizations in ***Colorado*** and while real property and ditch maintenance provisions apply, joint ditches do not have organization-specific legislative authorization. [[147]](#footnote-148)147 Once a ditch owner lawfully diverts water from a natural stream for beneficial use, the water becomes the ditch owner's real property right but also becomes unprotected by the water statutes governing changes in water rights. [[148]](#footnote-149)148 Therefore, unlike stockholders in mutual ditch companies, discussed below, ditch owners have no obligation to avoid injury to other users claiming reliance on that water. [[149]](#footnote-150)149

ii. Mutual ditch companies

Mutual ditch companies ("MDCs") were the first statutorily established water organizations in ***Colorado***, and were authorized as early in the 1860s in most Western states. [[150]](#footnote-151)150 MDCs were established in several ways, including by joint ditch owners who traded their interests for stock in MDCs, holders of water rights who transferred their rights to the MDCs in exchange for stock, and by land developers who conveyed their stock along with each acre sold. [[151]](#footnote-152)151 MDCs are one of two types of ditch companies in ***Colorado***; the other is the carrier ditch company. [[152]](#footnote-153)152 MDCs are non-profit and exist for the benefit of their shareholders, storing and transporting water to shareholders, who are the sole owners of their diversion works. [[153]](#footnote-154)153 Carrier ditch companies convey water for sale to consumers who have contracted with the company and operate at a profit; their water charges are fixed by the board of county commissioners. [[154]](#footnote-155)154

MDCs typically issue shares of stock that represent the shareholder's right to receive water. [[155]](#footnote-156)155 MDCs are non-profit entities financed almost entirely through shareholders' pro rata stock assessments and user fees. [[156]](#footnote-157)156 Although the company holds legal title to water rights and represents its users against other appropriators, each shareholder is the beneficial owner of the individual water rights as evidenced by shares. [[157]](#footnote-158)157 MDCs are found in unincorporated form, and also in incorporated form to insulate shareholders from liability. [[158]](#footnote-159)158 A state water official indicated that smaller unincorporated MDCs are much more common in the less-densely populated, **[\*49]** higher upstream areas of the West Slope than on the more highly populated, lowland East Slope. [[159]](#footnote-160)159

Shareholders participate in MDC governance issues to varying extents. [[160]](#footnote-161)160 Both kinds of MDCs are subject to the Ditch and Reservoir Companies Statute as well as other statutes relevant to all corporations, requiring that MDCs be governed by a board of directors. [[161]](#footnote-162)161 But an MDC's articles of incorporation may vest shareholders with special or conditional voting rights based on their class of shares and may establish classes of members or directors with certain voting rights. [[162]](#footnote-163)162

C. Transfers under mutual ditch companies: general principles

Because MDC stockholders are the equitable owners of water rights, shareholders may change the use of their pro rata share of water rights outside the ditch without the company's approval, provided other users are not injured. [[163]](#footnote-164)163 The companies' bylaws, however, typically contain provisions governing transfers, rights of first refusal, and other restrictions that commonly require MDC approval. [[164]](#footnote-165)164 Although ***Colorado*** has permitted transfers if the transferor continues to bear an appropriate share of maintenance costs, ***Colorado*** courts have upheld an MDC by-law limiting changing the place of use to lands within a single county. [[165]](#footnote-166)165 Water rights in the form of ditch company stock readily facilitate transfers but they may be subject to federal securities laws. [[166]](#footnote-167)166

Water development strategies such as reuse are generally unavailable for water organizations like ditch companies because they are cost-prohibitive. [[167]](#footnote-168)167 Nevertheless, MDCs and joint ditches are extremely flexible water organizations that permit temporary water rights transfers to allow for efficient water distribution to those with the greatest need. [[168]](#footnote-169)168 The precise number of ditch companies is difficult to ascertain, [[169]](#footnote-170)169 but **[\*50]** there are likely thousands of ditch companies in ***Colorado*** which collectively account for a significant share of agricultural water pertinent for this study. [[170]](#footnote-171)170

1. Water users' associations

Like irrigation districts, water users' associations were originally organized as private corporations to take advantage of turn-of-the-century federal Reclamation projects. [[171]](#footnote-172)171 Although conservancy and conservation districts have generally supplanted private water users' associations, some of the original organizations still exist, including the Uncompahgre Valley Water Users Association. [[172]](#footnote-173)172 Like MDCs, boards of directors control water users' associations, but the rules may give stockholders limited voting rights. [[173]](#footnote-174)173 Water users' associations are vested with the same authority as irrigation districts, as well as traditional corporate powers and their own statutory powers. [[174]](#footnote-175)174 The form and purpose of today's water users' associations vary greatly but it is common that the organizations act as advocacy groups facilitating their constituents' involvement in a wide range of water issues. [[175]](#footnote-176)175

**[\*51]**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Ability | Ability to | Ability of its | Additional |
|  | to | hold water | users to transfer | constraints on |
|  | initiate | rights | water rights | transfers |
|  | water |  |  |  |
|  | rights |  |  |  |
| Conservation | yes | yes | yes, with approval | terms of federal |
| Districts |  |  | of the district | allotment contracts |
|  |  |  | "Enterprise" (***River*** |  |
|  |  |  | District) |  |
| Conservancy | yes | yes | yes, with board | terms of federal |
| districts |  |  | approval | allotment contracts |
|  |  |  |  | and district by- |
|  |  |  |  | laws and ***CO*** Water |
|  |  |  |  | Conservancy Act |
| Irrigation | yes | yes | yes, upon approval | district rules and |
| districts |  |  | by two-thirds of | by-laws and ***CO*** |
|  |  |  | district electors | Irrigation District |
|  |  |  |  | law |
| Mutual | yes, at | yes, at | yes | company articles of |
| ditch | end-user | end-user |  | incorporation, by- |
| companies | level | level |  | laws and rights of |
|  |  |  |  | first refusal |

Table 1. Comparison of ***Colorado*** water organizations' powers relative to transfers.[[176]](#footnote-177)176

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). STATUTORY CONSTRAINTS ON AGRICULTURAL WATER RIGHTS TRANSFERS IN ***COLORADO***

A. General state statutory constraints and considerations

The Water Conservancy Act, as described above, authorizes the legal creation of conservation and conservancy districts. [[177]](#footnote-178)177 Although the conservancy statutes do not directly address the boards' powers regarding transfers, the ***Colorado*** ***River*** District and Southwestern District are mandated internally to protect Western slope interests, predominantly agriculture. [[178]](#footnote-179)178 Conservancy district boards, as noted above, are charged with preventing the sale of water outside district boundaries. [[179]](#footnote-180)179

**[\*52]** Conservancy district boards are empowered to "sell, lease, or otherwise dispose of water, waterworks, water rights, and sources of supply of water for use within the district, " but also to "acquire, construct … control, and use any and all works … . to the exercise of its power, both within and without the district for the purpose of providing for the use of such water within the district," as well as to "take by appropriation … water, waterworks, water rights … and any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers." [[180]](#footnote-181)180 ***Colorado*** also has a basis of origin mitigation statute, which only applies to exports from the ***Colorado*** ***River*** basin, requiring that the waterworks from the exporting basin "not be impaired nor increased in cost at the expense of the water users within the natural basin." [[181]](#footnote-182)181 This provision added an important "compensatory storage" requirement for what are typically trans-mountain transfers from the West Slope to the East Slope, the most notable of which is Northern's Green Mountain Reservoir. [[182]](#footnote-183)182

Conservancy district boards are also empowered to contract with the federal government to construct, operate and maintain necessary works with the requisite water rights and to "list in separate ownership the lands within the district which are susceptible of irrigation from district sources and to make an [efficient and beneficial] allotment of water to all such lands." [[183]](#footnote-184)183 Boards are also charged with levying assessments against the lands in the district to which water is allotted, and fixing rates for different classes of water users. [[184]](#footnote-185)184 Federal allotment and other contracts authorize compliance with the Act. [[185]](#footnote-186)185 Conservancy districts are compelled to use the benefits of any water they develop within their own boundaries. [[186]](#footnote-187)186 However, the ***Colorado*** Supreme Court has found transfers by districts "not per se impermissible," largely on the basis of federal allotment contracts, but also on the basis of Reclamation law and the Water Conservancy Act. [[187]](#footnote-188)187

B.

"External" Constraints

Other state and local statutory constraints relevant for assessing the ability of districts to transfer water include the "area-of-origin" mitigation statute, House Bill 1041, Senate Bill 03-73, and the state's anti-export **[\*53]** statute. All of these statutes require further investigation, but will be briefly introduced here.

In response to the inability of Title 37 to completely preclude transfers and the controversy of increasing changes of large tributary irrigation rights to urban rights, proposals restricting out-of-basin transfers have been suggested for many years and continue to this day. [[188]](#footnote-189)188 Scholars partly blame ***Colorado***'s ineffectiveness in restricting transfers on the state's lack of a "public trust" or "public interest" doctrine as a means to provide basin-of-origin protection from trans-basin diversions. [[189]](#footnote-190)189

However, ***Colorado*** recently adopted legislation requiring area-of-origin mitigation measures for transfers of more than one thousand acre-feet of consumptive use per year from irrigated agricultural in one county to non-agricultural use in another county. [[190]](#footnote-191)190

The bill reflects the conservationist thrust of a public trust doctrine, but also its economic thrust, as it requires compensation payments to affected governmental entities, including water organizations, for lost real estate property tax revenue from loss of irrigation. [[191]](#footnote-192)191 Three exemptions work to dilute the measure's effectiveness: (1) mitigation payments do not apply to water rights held or pending as of August 3, 2003; (2) most water organizations and municipalities are exempt from payments if the change is within their service areas; and (3) mitigation payments are not required if the new place of use is within a 20-mile radius of the historic place of use, even if the new place of use is in a different county. [[192]](#footnote-193)192 Mitigation payments are also not an "absolute requirement," and no water court decree has yet been entered in a case subject to these provisions. [[193]](#footnote-194)193

Some scholars held out hope that House Bill 1041 would help keep water in-basin because the bill was established to "empower[] local governments to regulate projects that affect the state interest … [and] increasing significantly the power of local government to control land use activities," including water development projects. [[194]](#footnote-195)194 The thrust of the House Bill 1041 powers is the ability of local government to require a county permit for any activity designated as a matter of state interest. [[195]](#footnote-196)195 The ***Colorado*** Supreme Court has rejected challenges by East Slope interests contending that House Bill 1041 is an unconstitutional delegation of power to local government. [[196]](#footnote-197)196 The court has even rejected Denver's contention that it was exempt from local governmental regulation under House Bill 1041 as a home rule city. [[197]](#footnote-198)197 Additionally, the ***Colorado*** court **[\*54]** of appeals has held that "the existence of previously decreed water rights does not provide an exemption for the developer from regulation." [[198]](#footnote-199)198 However, "a county may regulate but not prohibit proposed water development projects, although the scope of county regulation is unclear." [[199]](#footnote-200)199

Finally, ***Colorado*** has placed statutory restrictions on out-of-state water transfers. [[200]](#footnote-201)200 ***Colorado*** is not unique in this matter, as many western states have anti-export statutes governing the diversion of water outside state boundaries. [[201]](#footnote-202)201 ***Colorado***'s anti-export statute makes it unlawful for "any person, including a corporation, association, or other entity, to divert, carry, or transport by ditches, canals … or any other means any of the water resources found in this state into any other state for use therein without first complying with" anti-export provisions and paying fees under C.R.S. [*sec. 37-81-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36T-00000-00&context=1516831). [[202]](#footnote-203)202

Section 37-81-104 authorizes a fee of fifty dollars per acre-foot of water diverted out of the state for beneficial use. [[203]](#footnote-204)203 The statute sets forth procedures to assure compliance with interstate water delivery compacts, but any diversion to an out-of-state use must still go through an official approval proceeding. [[204]](#footnote-205)204 The state engineer, groundwater commission, or water judge approving the diversion must find that the "proposed use of water is not inconsistent with the reasonable conservation of water resources of the state," and that it will "not deprive the citizens of the state of the beneficial use of waters apportioned to ***Colorado*** by interstate compact or judicial decree." [[205]](#footnote-206)205

A state's anti-export statute is preempted by federal law, in this case Article IX of the 1948 Upper ***Colorado*** ***River*** compact, because the U.S. Constitution prohibits discrimination against interstate commerce. [[206]](#footnote-207)206 Article IX precludes states, signatory or otherwise, from denying the Upper Basin states the right to acquire rights and supply and construct waterworks for delivery of water to Lower Basin states or to any "downstream" states, when such use is "within the apportionment to such [lower] state by **[\*55]** this compact." [[207]](#footnote-208)207 For a statute to be unconstitutional, the federal and state laws in question must contradict each other. [[208]](#footnote-209)208 Although the federal government has been loath to take regulation of water and other natural resources over from the state, Sporhase v. Nebraska, the groundbreaking 1983 Supreme Court case, made it unlawful to prohibit the export of groundwater between states. [[209]](#footnote-210)209

Although it is difficult to say whether ***Colorado***'s anti-export statute would pass constitutional muster because very few states' anti-export statutes have been tested in federal court, a brief analysis would tend to suggest that it would be unconstitutional under the 1948 Compact for conflicting directly with Article IX. Although conditioning export on certain measures (i.e. legislative approval) is constitutional, it is not clear that "fees" would count as "conditions" or discrimination. Scholars also find the provision that ***Colorado*** citizens "cannot be deprived of water by compact" problematic because they consider ***Colorado*** to be attempting to impermissibly "enlarge" the rights it was given under the 1922 and 1948 compacts. [[210]](#footnote-211)210 Nevertheless, the Lower Basin States' entitled apportionment would also have to be valid under Article IX for ***Colorado*** to have to export its water regardless of whether its export statute is constitutional. [[211]](#footnote-212)211 But until this year there has been considerable uncertainty regarding not only availability, but entitlement, for each state. [[212]](#footnote-213)212

Other adjudicatory considerations for transfers apart from those mentioned in Section III include "calls on the ***river***" and subordination agreements. The primary calls on the Upper ***Colorado*** ***River*** during the irrigation season are the "Cameo Calls," located in the Grand Valley area, which contains some of the basin's most senior water rights, and the Shoshone Call, which is related to Green Mountain Reservoir, mentioned infra. ***River*** calls and subordination agreements can affect the timing and quantity of delivery to users in any given year, so it is unclear whether they would impact transfers. However, experts have indicated that Senate Bill 03-73, which recently revised the procedures for replacing out-of-priority depletions, may result in greater overall reductions in irrigated lands, and could therefore could impact the transfer landscape and warrants **[\*56]** further investigation. [[213]](#footnote-214)213 The role of the CWCB, described in Section II, and increasingly involved in water planning statewide, should also explored with respect to impacts on transfers. Finally, future scholars should explore the Arkansas ***River*** water banking experiment, for which ***Colorado*** created legislature to establish district-level water banking.

C. Federal constraints and considerations

The Water Conservancy Act requires that waterworks planned and designed for transfer "out of the ***Colorado*** ***river*** and its tributaries" by any conservancy district comply with the 1922 ***Colorado*** ***River*** Compact and Boulder Canyon Project Act. [[214]](#footnote-215)214 The 1922 Compact sets total apportionments, determines dispute mechanisms, protects pre-1922 perfected rights, and prescribes obligations of the Upper Basin states to the Lower Basin states, but only in the aggregate. [[215]](#footnote-216)215 In 1956 Congress enacted the ***Colorado*** ***River*** Storage Project Act (CRSPA), putting into place a network of ***Colorado*** ***River*** reservoir structures to support the operation of the 1922 Compact. [[216]](#footnote-217)216 The projects are mainly for hydro-power but also increasingly for flood control and agriculture, with many conservancy districts involved as both opponents and proponents. [[217]](#footnote-218)217 The realization that the seventy-five million, ten-year running average Lower Basin apportionment would leave the Upper Basin states severely shorted in dry times because of reliance on the longest wet cycle in recorded ***Colorado*** history (1905 to 1929), led to the creation of projects through the CRSPA to assure local agricultural and domestic supplies. [[218]](#footnote-219)218 The Boulder Canyon Project Act ("BCPA"), is a comprehensive scheme for apportionment within the Lower Basin. It does not directly apply to Upper Basin states, [[219]](#footnote-220)219 but would likely have implications for the Upper Basin states in the event of curtailment, particularly since the BCPA only applies to main-stem ***Colorado*** ***River*** supplies.

On the other hand, the 1948 Upper ***Colorado*** ***River*** Basin Compact sets out apportionment among Upper Basin states, and mandates specific minimum flows and interstate obligations for ***Colorado*** tributaries such as the Yampa and San Juan ***Rivers***. [[220]](#footnote-221)220 Most importantly for the purposes of this study, the Upper Basin Compact precludes states, signatory or otherwise, from denying the Upper Basin states the right to acquire rights to supply and construct waterworks for delivery of water to Lower Basin states or to any "downstream" states, when such use is "within the apportionment **[\*57]** of such Lower State made by this Compact." [[221]](#footnote-222)221 The relevance of Article IX for this study is clarified in Section A above in the context of the constitutionality of ***Colorado***'s anti-export statute.

The other major federal law involved in transfer restrictions by conservation and conservancy districts is Bureau of Reclamation law. The 1922 Reclamation Act enabled conservation and conservancy districts to enter into repayment of large water development projects. [[222]](#footnote-223)222 As noted above, the Water Conservancy Act authorizes districts to contract with both the federal government and a wide range of allottees. [[223]](#footnote-224)223 The 1922 Act and subsequent Reclamation laws impact transfers through federal contracts, which partly dictate the terms of the districts' allotment contracts with end-users. [[224]](#footnote-225)224 If conservancy districts enter into federal contracts with Reclamation, the government typically owns title to the waterworks, the conservancy district typically assumes the role of "middleman" with perpetual rights to use the government water, and the end-user has only beneficial use of the water. [[225]](#footnote-226)225 The added federal government nexus can severely restrict the end-users' rights in terms of transfers, [[226]](#footnote-227)226 and may also make the rights very ambiguous. [[227]](#footnote-228)227

The water for federal projects has historically been devoted to agriculture but is increasingly municipal, with the Animas-La Plata project being the most recent project. [[228]](#footnote-229)228 Use of water from Reclamation projects is controlled by both ***Colorado*** water law and Reclamation law, obviating or diminishing the need for water rights or rights changes to be validated in water court; a contract represents the right to use the water. [[229]](#footnote-230)229 However, project water can only be used for certain purposes, which are usually specified by Congress. [[230]](#footnote-231)230 Still, it is important to bear in mind that since 1987, the Bureau of Reclamation has changed its primary mission from a developer of large, federally-financed agriculture projects to "resource manager." [[231]](#footnote-232)231 The Bureau's changing role has meant increased voluntary water transfers and transfer restrictions versus unilateral federal action, with water organizations at the helm. [[232]](#footnote-233)232

Lastly, since ***Colorado*** is comprised of one-third federal land, federal permitting requirements under such laws as the Clean Water Act, Endangered Species Act, and Wilderness Act can impact transfers. [[233]](#footnote-234)233 Conservation **[\*58]** and conservancy districts typically apprise end-users of permits that are already obtained or will likely need to be obtained, through contracts with Reclamation.

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). GOVERNANCE CONSTRAINTS AND CONSIDERATIONS: BY-LAWS, RULES AND POLICIES OF SPECIFIC WATER ORGANIZATIONS

A. Conservation Districts: Case Study

1. ***Colorado*** ***River*** Water Conservation District (the "***River*** District")

As noted above, the ***River*** District is one of ***Colorado***'s four conservation districts, created in 1937 to protect primarily West Slope agricultural interests in fifteen counties. Indeed, one of its first projects was the negotiation, planning, and construction of Green Mountain Reservoir to provide replacement for water lost to the East Slope through Northern's ***Colorado***-Big Thompson project, described below, under the Act's statutory basin-of-origin mitigation provision. [[234]](#footnote-235)234 The ***River*** District covers approximately 29,000 square miles, which is roughly 28% of the land area of ***CO***. [[235]](#footnote-236)235 The ***River*** District is involved with numerous projects and policies on behalf of its constituents, largely at the conservancy district level. [[236]](#footnote-237)236 The District also protects ***Colorado***'s interests with respect to ***Colorado*** ***River*** Compact entitlements. [[237]](#footnote-238)237 This component of the study will focus on the ***River*** District's water marketing scheme, which allows its "Enterprise" to contract water out to end-users with federally-decreed and non-federally decreed water rights.

The ***River*** District's bylaws are statutorily codified as C.R.S. [*§ 37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831) and C.R.S. [*§ 37-46-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PR-00000-00&context=1516831), and provide broad regional mandates. [[238]](#footnote-239)238 The ***River*** District acts as a "wholesaler" in authorizing the Enterprise to provide for the beneficial use of water available from its storage capacity in two reservoirs: Wolford Mountain and Eagle Park, through a water marketing scheme governed by the District's "Water Marketing Policy" and **[\*59]** contract terms. [[239]](#footnote-240)239 The Board authorizes the General Manager to implement and administer water supply contracts, and authorizes the President to execute water supply contracts on behalf of the Enterprise without further board action. [[240]](#footnote-241)240

Contractors are eligible to use ***Colorado*** ***River*** water supply from Wolford Mountain Reservoir, for which the ***River*** District has three water rights decreed in Division 5, and from Ruedi Reservoir and "other available sources in the water marketing program." [[241]](#footnote-242)241 The Enterprise may enter into contracts with users within a conservancy district's service area with an existing program to serve such users only if the conservancy district is "unable or unwilling" to provide such service. [[242]](#footnote-243)242 The Basalt Water Conservancy District, the Middle Park Water Conservancy District, and the West Divide Water Conservancy District are all part of the program. [[243]](#footnote-244)243 The Enterprise provides water supply for agriculture, municipal, and industrial uses pursuant to contracts. [[244]](#footnote-245)244

Contractors may not apply for or secure any change in the water rights associated with supply, and in particular, are precluded from filing for Enterprise water without first filing an application with the ***River*** District. [[245]](#footnote-246)245 Otherwise, users are subject to an extra $ 400 fee on top of a $ 400 application fee. [[246]](#footnote-247)246 Conservancy districts must provide a map of their anticipated service area, and districts and individuals must prove need for the program water in the quantity requested, with a minimum of 0.1 acre-feet per year and a maximum of 1000 acre-feet. [[247]](#footnote-248)247 Users must also designate whether they are applying for "full-term" contracts (5 years to 40 years with the right to renew), or "interim" contracts (5 or less years, which unlike full-term, can include water for out-of-basin uses. [[248]](#footnote-249)248 The Enterprise may enter into contracts with third parties for use of water supplies directly or by exchange or augmentation, within or outside of Division 5, but only within the state, subject to site-specific determination by the district's General Manager and General Counsel. [[249]](#footnote-250)249 Contractors may not transfer water supplies without prior written notice, approval of the Enterprise, and payment of a transfer fee. [[250]](#footnote-251)250 Finally, contractors must also comply **[\*60]** with delivery contingencies, i.e. water decrees for sources of supply, terms and conditions of permits for sources and facilities, the ***River*** District's organic statute, and other applicable ***Colorado*** Law. [[251]](#footnote-252)251 Thus, Water District contracts obviate end-users' need to go through water court for changing water rights, but restrict the extent to which water can be applied and transferred.

B. Conservancy Districts: Case Studies

1. Northern ***Colorado*** Water Conservancy District ("Northern")

Northern, the largest of the conservancy districts in terms of population served, runs a marketing scheme similar to the ***River*** District's, but it operates differently. The first of its kind, the ***Colorado*** Big-Thompson ("C-BT") project was created in 1937 primarily to deliver water to farmers in the South Platte Basin in Water Division 1 following the Dust Bowl. [[252]](#footnote-253)252 Northern's contracts with end-users are only for supplemental water rights, and only apply to return flows. The flexibility of the C-BT system completely removes the need for water court and allows users to reuse water to extinction, since the water is the result of trans-mountain diversion. [[253]](#footnote-254)253 Northern's twelve-member board is appointed by district court judges in individual directors' home counties. [[254]](#footnote-255)254

Northern has the decreed right to divert 310,000 acre-feet per year from the C-BT project, but diverts 220,000 acre-feet per year on average with water increasingly used for municipal over agricultural uses. [[255]](#footnote-256)255 Every year, Northern informs contract allottees of available quotas under their contracts. [[256]](#footnote-257)256 Northern adopted its rules and regulations on water quotas and delivery in 1956, with amendments in 1975. [[257]](#footnote-258)257 These rules, together with the Reclamation contract for the C-BT (and all relevant aforementioned law) govern allotment contracts with users.

Allotment contracts are categorized by "class," with Class C governing the right of individuals to use water for supplemental irrigation purposes by irrigation districts, and Class D governing the right of individuals to supplement their irrigation supplies. [[258]](#footnote-259)258 Corporate form allotment contracts **[\*61]** apply to mutual ditch companies, industries, and other corporations or entities. The water quota rules specifically provide for transfers without any restrictions - apart from beneficial use - within the district: "use of allotted water is not strictly limited to the lands of each allottee, [so] transfer of water during irrigation season may be made by rental of water from one allottee to another." [[259]](#footnote-260)259 Annual use of water is not restricted by contract to the lands or areas defined in each allotment contract. [[260]](#footnote-261)260 Therefore, an allottee may seasonally rent and transfer water from one area of the District to another and from one class of service to another. [[261]](#footnote-262)261 Changes in type of use require change to a different form of allotment contract because different classes and rates apply. [[262]](#footnote-263)262

Rules for the C-BT allotment reflect the standard federal contractual role of the United States as trustee and full owner of the water rights. The contract gives Northern the right to use the water through full contractual compliance and though its agreement to disclaim any ownership in the water to end-users. [[263]](#footnote-264)263 End-users have user rights per contract allotment terms, no greater than those of the district. [[264]](#footnote-265)264 But the Secretary of the Interior, and not merely Northern's board, must consent to the inclusion of lands serviced by the contract within the district. [[265]](#footnote-266)265

Water allotted for irrigation must also be "supplemental," meaning the amount of supplemental water together with existing water supplies available to described lands, necessary to irrigate the land. [[266]](#footnote-267)266 The board must make the determination as to supplementation, and the water must be applied beneficially within the district. [[267]](#footnote-268)267 Contract rules also lay out the conditions for withholding water to allottees. [[268]](#footnote-269)268 Return flows are to be allocated only to irrigable lands already partially supplied and the District must collect reports of crop lists of irrigated lands. [[269]](#footnote-270)269

The federal contract between Northern and Reclamation for C-BT construction and operation is also a classic example of federal primacy in major federal water projects. The federal government retains ownership in the waterworks; Northern has perpetual rights to use all water, excluding water made available to the Green Mountain Reservoir; the water should be used primarily for irrigation; the Secretary of the Interior sets flow rates; and Reclamation can refuse to deliver water if contractual obligations are not met. [[270]](#footnote-271)270 The District will also cause "all water filing for the **[\*62]** project made in its name or in its behalf to be assigned to the United States." [[271]](#footnote-272)271

Thus, after the contractors divert C-BT water from Division 5, the water is very flexible in terms of transfers within the district, but not outside of the district. Northern's allotment contracts completely preclude end-users' need to go through water court for changing water rights. But Northern is increasingly restricting the extent to which its contractors can transfer water within its district through its water marketing schemes due to recent speculation concerns. [[272]](#footnote-273)272

2. Southeastern ***Colorado*** Water Conservancy District ("SECWCD")

All of SECWCD's water rights are part of the Fryingpan-Arkansas ("Fry-Ark") federal Reclamation project, serving domestic and agricultural water constituents in the Arkansas ***River*** Valley in Water Division 2. [[273]](#footnote-274)273 Since the district exists to run the Fry-Ark project, its rules are not embodied in one particular set of bylaws, but in a collection of documents that frame the running of the project: "Operating Principles," Fry-Ark's federal contract with Reclamation, "Allocation Policies" and the Enterprise's "Policy on Return Flows." [[274]](#footnote-275)274

Like Northern, the SECWCD allocates water on the basis of "allocation principles." [[275]](#footnote-276)275 Until 2002, the average allocation was around seventy-five percent of available water, but since the drought agricultural allocations have been curtailed because municipal users have been requesting their full fifty-one percent, as allowed by the "Principles." [[276]](#footnote-277)276 The estimated irrigable area of the Fry-Ark project is 280,600 acre-feet. [[277]](#footnote-278)277 The SECWCD has a separate entity to allocate return flows in its "Enterprise," and like Northern, the flows can only be supplemental and can only be used within the district. [[278]](#footnote-279)278 Other water organizations within the district have to comply with the Allocation Principles to receive their water. [[279]](#footnote-280)279

In 1962, Congress authorized construction of the Fry-Ark Project under Public Law 87-590, which included construction of Ruedi Dam and Reservoir in 1964, on which the ***River*** District and its constituents partly **[\*63]** rely for West Slope replacement water. [[280]](#footnote-281)280 The SECWCD owns all project rights except Ruedi Dam and Reservoir, which the ***River*** District owns. [[281]](#footnote-282)281 The "Fryingpan Arkansas Operating Principles," which also control operation of the project, were negotiated and signed not only by the SECWCD, but by the ***River*** District, Southwestern Water Conservation District, and the CWCB, because many of the provisions are related to West Slope compensatory storage needs. [[282]](#footnote-283)282 After West Slope replacement water and ***Colorado***'s interstate compact obligations are fully satisfied, excess water may be sold or leased by the United States via the SECWCD to water users for any purpose, even outside the natural basin, with the mutual consent of the signatories. [[283]](#footnote-284)283

As with C-BT water, each spring Reclamation notifies SECWCD as to the amount available to the district each year. [[284]](#footnote-285)284 An "allocation committee" meets to review applications and prepare recommendations for water allocations, which the SECWCD board must approve. [[285]](#footnote-286)285 Project water is allocated on an acre-foot-per irrigated-acre basis. When demand exceeds supply, [[286]](#footnote-287)286 "each ditch only receives a proportional share of available project water," and only after "municipal requests are met up to fifty-one percent of the annual project yield." [[287]](#footnote-288)287 The district allocates water but the Bureau is responsible for accounting for the delivery of project water and setting water prices. [[288]](#footnote-289)288 Prices are set on the irrigator's ability to pay and the average cost of farming operations under current economic conditions. [[289]](#footnote-290)289

Reclamation owns the supplemental water, but the district retains dominion and control of return flows through the Enterprise, which makes return flows available to eligible entities, primarily for augmentation. [[290]](#footnote-291)290 Return flows cannot be resold, used, or disposed of outside the district. [[291]](#footnote-292)291

The SECWCD Allocation Principles also contain anti-speculation and anti-waste provisions: eighty percent of any allocation of agricultural **[\*64]** Project water must be used by November 1 of the current year and the remaining twenty percent must be used by May 1 of the following year, or be subject to forfeiture. [[292]](#footnote-293)292

Thus, SECWCD water may be transferred outside district boundaries via federal contracts under limited circumstances, but is subject to increasing municipal demand within the district.

3. Upper Gunnison Water Conservancy District ("UGWCD")

Upper Gunnison is a smaller conservancy district in terms of population served, located in Water Division 4, more representative of the smaller conservancy districts on the Western Slope. [[293]](#footnote-294)293 The district uses its powers in ways similar to the larger districts through a combination of public education, legislative lobbying, and increasingly, litigation. [[294]](#footnote-295)294 It is not the beneficiary of any one project, federal or otherwise. Because it came into existence in 1959 as the legal entity to handle the construction and operation of the Upper Gunnison Project, and because that project failed, it sought other ways to solve its water needs. [[295]](#footnote-296)295 The UGWCD addressed its water needs largely through recreation, and agriculture and wildlife, actively opposing several attempts at trans-mountain diversions by other organizations. [[296]](#footnote-297)296

The UGWCD historically heavily relied on the ***River*** District for "financial, legal, engineering and political advice and leadership," together with the Grand Junction Reclamation office. [[297]](#footnote-298)297 Then the UGWCD became actively involved in a number of lawsuits in the late 1980s: the Union Park Project, Taylor Reservoir operations, Aspinall Unit operations, quantification of the of Black Canyon of the Gunnison reserved water right, and basin-wide augmentation plans. [[298]](#footnote-299)298 The district, with its small size lacking the votes or financial resources to accomplish its goals, credits its success in political activities largely to its imperative that the district to be "both better informed and more influential" than its opponents. [[299]](#footnote-300)299 It has maintained a close working relationship with its "allies" such as the ***River*** District, Uncompahgre Valley Water Users' Association, Bureau of Reclamation, the CWCB, State Engineer and Attorney General's Office. [[300]](#footnote-301)300 **[\*65]** It is also "in communication" with "other crucial allies": the Southwestern Water Conservancy District, Rio Grande Water Conservation District, the Tri-County Water Conservancy District and Northern. [[301]](#footnote-302)301

Gunnison's decree and bylaws are a reflection of these mandates. [[302]](#footnote-303)302 Although there are no provisions specifically alluding to transfer policies, the laws espouse an "in-basin" theme: "the principal projects and purposes, by accomplishment of which the lands within its boundaries will be benefited, are as follows: … by whatever lawful means may be necessary, convenient or required, to defend and to protect the waters having their source and origin within the boundaries of the proposed District, from and against diminution or depletion by unlawful or unwarranted claims or demands thereon by any area or water user or users." [[303]](#footnote-304)303 The District is also charged with making surveys to determine the best and most beneficial use of waters within its boundaries, to make appropriations for its constituents, to make "any and all acts and things necessary or advisable to secure and insure an adequate supply of water, within the boundaries of the District and within the limits of available water supplies, for present and future use for all beneficial purposes." [[304]](#footnote-305)304 Additionally the District is involved in the adjudication "for priority in the name of the District and on its behalf or in the name of individual water users." The District shall ..."participate in actions which may involve rights to use water for all beneficial purposes, whether such rights by owned by the District, or by any individual or corporate water user or users within the District, or in any manner involving or affecting the powers, rights or functions of the District." [[305]](#footnote-306)305 The board consists of eleven members who serve for four-year terms. The bylaws otherwise largely contain governance language from the Water Conservancy Act. Gunnison's 2010 goals include: protection of Upper Gunnison Basin water resources for in-basin use, including activities opposing any application for a water service contract for the Aspinall Unit for uses involving trans-mountain or trans-basin diversion; protecting existing and future decreed water uses within the Upper Gunnison Basin from calls from senior water rights with downstream diversions, including monitoring 1922 and 1948 Compact compliance and state actions intra-state shortage allocations; promoting its recreation in-channel diversion right; and coordinating with the ***River*** District's water activity Enterprise to purchase pre-1922 rights.

**[\*66]** Thus, small conservancy districts such as the UGWCD, which comprise the vast majority of conservancy districts in ***Colorado*** in terms of scale, play an important, if non-explicit, role in keeping water in-basin.

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). CONCLUSIONS AND AREAS IN NEED OF FURTHER EXPLORATION

Although ***Colorado*** does not prohibit the extra-district transfer of water per se, analyzing the extent to which transfers are allowed involves a complex calculus of possible restrictions at different scales, in which water organizations play a crucial role. "For a trans-basin project to succeed today, it must feature a degree of Front Range/ Western Slope cooperation lacking in historic diversions because legal tools now exist to block new projects." [[306]](#footnote-307)306 The political and legal rise of state organizations, including water organizations, in planning and development, seem to suggest that transfers at not only the extra-district but extra-basin level (not to mention at the trans-mountain level), will be increasingly difficult. Indeed, many water conservancy districts prohibit the extra-district transfer of water altogether. Allotment contracts may facilitate transfers at a small or even regional scale, but transfers can still be largely constrained by federal Reclamation and water district terms. Though history and hydrogeology have made trans-mountain and trans-basin transfers an imperative in the past, and federal compact law will likely trump ***Colorado***'s anti-export state law in the event of an inter-state call, it is difficult to know what impact these dynamics would have on intra-state transfers. But analyzing agricultural water transfers from the water organization-level, particularly with more data on conservancy districts and ditch companies, which hold the bulk of the water and power, could yield considerable insight into the matter.

Future efforts should be spent on continuing to learn about the internal governance issues associated with the fifty conservancy districts, including the extent to which organization "type" (e.g. wholesaler, provider, policy advocate, etc.) influences the amount of water to which the districts hold rights, and therefore the extent to which those rights can be transferred. Visits to actual water district board meetings to yield further information on conservation and conservancy districts covered in this report, and further case studies into different and more geographically representative district types (i.e. from Divisions 6 and 7) are recommended. Efforts should also be made to get a better handle on the "wild card" ditch companies, which likely have a big impact on control of irrigation water in the aggregate: determining where the ditch companies with the largest holdings exist, how much water the ditch companies hold, and at what frequency the companies transfer rights. Talking with water commissioners in the individual water districts would be helpful in this respect. An **[\*67]** inquiry should be made into how water rights holdings and transfers work under irrigation companies and water users' associations. More research should be undertaken on the "external" local and state players and instruments such as the CWCB and other legislative bills, in terms of potential impacts on transfers. Future scholars should also determine whether "agricultural water" in fact accounts for all of ***Colorado***'s possible uses of agricultural water, including pastureland and woodland, and not just cropland, and to have it quantified in terms of "historical consumptive use" to the greatest extent possible.

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1. 1 ***Colorado*** Water Conservation Board, Alternative Agricultural Water Transfer Methods to Traditional Purchase and Transfer, Statewide Water Supply Initiative: Final Draft Phase 2 Report 3-1 - 3-3 (2007) [hereinafter SWSI Report]. [↑](#footnote-ref-2)
2. 2 Id. at 3-1. [↑](#footnote-ref-3)
3. 3 Patrick Creeden, History: A Look Back at the Historical Role of Agriculture in the Rockies 17 (2010), available at [*http://www.coloradocollege.edu/stateoftherockies/010%20Report%2*](http://www.coloradocollege.edu/stateoftherockies/010%20Report%2) 0Card/historyB.pdf. [↑](#footnote-ref-4)
4. 4 Katherine Sherwood, Overview Section: Common Ground for Competing Uses, The 2010 ***Colorado*** College State of the Rockies Report Card 37 (2010) ("Sherwood"), available at [*http://www.coloradocollege.edu/stateoftherockies/010%20Report%2*](http://www.coloradocollege.edu/stateoftherockies/010%20Report%2) 0Card/land\_waterB.pdf. [↑](#footnote-ref-5)
5. 5 Interview with David Freeman, Professor Emeritus, ***Colorado*** State University, in Fort Collins, ***Colo.*** (Feb. 12, 2010). [↑](#footnote-ref-6)
6. 6 Lawrence J. MacDonnell, Commentary, Public Water - Private Water: Anti-Speculation, Water Reallocation,and High Plains A&M, LLC v. Southeastern ***Colorado*** Water Conservancy District, [*10 U. Denv. Water L. Rev. 1,13 (2006).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4RJK-H9R0-00SW-503M-00000-00&context=1516831) [↑](#footnote-ref-7)
7. 7 Justice Gregory J. Hobbs, Jr., Symposium, The Role of Climate in Shaping Western Water Institutions, [*7 U. Denv. Water L. Rev. 1, 16-17 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4C46-DK00-00SW-5003-00000-00&context=1516831) Although Yunker v. Nichols is the first case to enshrine the prior appropriation doctrine in ***Colorado*** as the basis for the Constitution's governing principles for water use, Coffin v. Left Hand Ditch ***Co***. is cited as the case associated with prior appropriation in terms of dealing riparian rights their final death-knell in ***Colorado***. Id. "We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to ***Colorado***. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith." [*Coffin v. Left Hand Ditch* ***Co****., 6* ***Colo.*** *443, 447 (1882).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) Coffin also inextricably links the need for prior appropriation with the need for agricultural growth through the control of water: "The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity." [*Id. at 446.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) [↑](#footnote-ref-8)
8. 8 ***Colo.*** Const. art. XVI, § 6. [↑](#footnote-ref-9)
9. 9 MacDonnell, supra note 6, at 13. [↑](#footnote-ref-10)
10. 10 David H. Getches, Water Law in a Nutshell 423 (3d ed. 1997). [↑](#footnote-ref-11)
11. 11 Donald Snow, The Persistence of Powell: The Idea of Watersheds and Participatory Democracy, [*23 J. Land Resources & Envtl. L. 31, 36 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48GW-36B0-00CT-T059-00000-00&context=1516831) [↑](#footnote-ref-12)
12. 12 Scott Kirsch, Regions of government science: John Wesley Powell in Washington and the American West, 23 Endeavour no. 4, at 155, 157 (1999). [↑](#footnote-ref-13)
13. 13 Hobbs, supra note 7 at 20. [↑](#footnote-ref-14)
14. 14 Id.; Snow, supra note 11 at 35. Powell advocated the organization of irrigation and land use districts based on cooperative models of the Mormons in Utah and the Union Colony in ***Colorado***. Hobbs, supra note 7 at 20. He also advocated the withdrawal of reservoir sites from settlement under the Homestead laws once he realized that erratic climate conditions would not enable farmers to maintain their farms without stabilizing their water supplies with larger and stronger conveyance and retention structures than they could afford privately. Hobbs, supra note 7 at 20-21. [↑](#footnote-ref-15)
15. 15 See ***Colo.*** Rev. Stat. [*§ 37-41-101(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J295-00000-00&context=1516831) (2011). [↑](#footnote-ref-16)
16. 16 Interview with David Freeman, supra note 5. [↑](#footnote-ref-17)
17. 17 There are four water conservation districts in ***Colorado***, two of which are in the ***Colorado*** ***River*** basin: the ***Colorado*** ***River*** Water Conservation District and the Southwestern ***Colorado*** Water Conservation District. The ***Colorado*** legislature authorized their creation under the Water Conservancy Act (the "Act"), ***Colo.*** Rev. Stat. Ann. [*§ 37-45-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MB-00000-00&context=1516831) (West 2011) and also authorized them under individual provisions, ***Colo.*** Rev. Stat. [*§ 37-46-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PK-00000-00&context=1516831) (2011) (authorizing the ***Colorado*** ***River*** Water Conservation District); ***Colo.*** Rev. Stat. [*§ 37-47-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2SR-00000-00&context=1516831) (2011) (authorizing the Southwestern Water Conservation District); ***Colo.*** Rev. Stat. [*§ 37-50-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J302-00000-00&context=1516831) (2011) (authorizing the Republican ***River*** Water Conservation District); ***Colo.*** Rev. Stat. [*§ 37-48-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2VK-00000-00&context=1516831) (2011) (authorizing the Rio Grande Water Conservation District). [↑](#footnote-ref-18)
18. 18 For a full list of statutorily recognized conservancy districts in ***Colorado***, see ***Colo.*** Rev. Stat. [*§ 37-45-153*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2P5-00000-00&context=1516831) (2009). The conservancy districts and other water organizations relevant for this study, i.e. those which service or otherwise control water originally retained from the ***Colorado*** ***River*** basin for agricultural purposes, are included in the attached spreadsheet (electronic format only) as Exhibit A. The information for water organizations listed in ***Colorado*** Water Divisions 1, 2 and 5, most relevant for this study in terms of ***Colorado*** ***River*** basin coverage, is fairly exhaustive, but not complete. Water Divisions 4, 6, and 7 contain an incomplete list of water organizations that require further investigation. Future researchers should cross-reference the data in the spreadsheet with the GIS data sets on the CWCB's "CDSS" ("***Colorado*** Decision Support Systems") website, [*http://ibcc.state.****co****.us/*](http://ibcc.state.co.us/) Process/Needs/WaterSupply Availability/ (last visited Sept. 13, 2011) and the ***Colorado*** Division of Water Resources's website, [*http://water.state.****co****.us/pubs/gis.asp*](http://water.state.co.us/pubs/gis.asp) (last visited Jul. 5, 2010), which provide agricultural water holdings totals for individual conveyance structures, water divisions, and districts for each of the basins. For further explanation of ***Colorado*** Water Divisions, see Section II. A. For further explanation of water organizations in ***Colorado***, see Section III and Section V. [↑](#footnote-ref-19)
19. 19 Trout, Witwer & Freeman, P.C., Acquiring, Using, and Protecting Water in ***Colorado*** 191-197 (2004). The organic statute authorizing conservation and conservancy districts, the Water Conservancy Act was also created in 1937. ***Colo.*** Rev. Stat. Ann. [*§ 37-45-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2M9-00000-00&context=1516831) (West 2011); Hobbs, supra note 7 at 29. [↑](#footnote-ref-20)
20. 20 Hobbs, supra note 7 at 29. [↑](#footnote-ref-21)
21. 21 ***Colo.*** Rev. Stat. [*§ 37-45-102(1)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MB-00000-00&context=1516831) (2011). [↑](#footnote-ref-22)
22. 22 Id. [*§ 37-45-102(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MB-00000-00&context=1516831). [↑](#footnote-ref-23)
23. 231) The board has power on behalf of said district … (j) to appropriate and otherwise acquire water and water rights within or without the state; to develop, store, and transport water; to subscribe for, purchase, and acquire stock in canal companies, water companies, and water users' associations; to provide, sell, lease, and deliver water for municipal and domestic purposes, irrigation, power, milling, manufacturing, mining, metallurgical, and any and all other beneficial uses and to derive revenue and benefits therefrom; … but the sale, leasing, and delivery of water for irrigation, domestic, and other beneficial purposes as provided in this section, whether the water is developed by the principal district or a subdistrict thereof, shall only be made for use within the boundaries of either the principal district, or the subdistrict, or both. ***Colo.*** Rev. Stat. [*§ 37-45-118*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (2011) (emphasis added); [*Matthews v. Tri-Cnty Water Conservancy Dist., 613 P.2d 889, 893 (****Colo.*** *1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1CK0-003D-91W5-00000-00&context=1516831) (holding that water conservancy districts are generally prohibited by statute from selling water for use outside of district boundaries). [↑](#footnote-ref-24)
24. 24 The Northern ***Colorado*** Water Conservancy District ("Northern") was largely created in response to East Slope pressure for agricultural and municipal water from the West Slope, and the ***Colorado*** ***River*** Water Conservation District (the "***River*** District") was largely created in response to Northern's formation, to protect West Slope agricultural interests. Interview with David Freeman, supra note 5. [↑](#footnote-ref-25)
25. 25 Geoffrey M. Craig, House Bill 1041 and Transbasin Water Diversions: Equity to the Western Slope or Undue Power to Local Government? [*66 U.* ***Colo.*** *L. Rev. 791, 791 (1995).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-T990-00CV-N063-00000-00&context=1516831) [↑](#footnote-ref-26)
26. 26 Hobbs, supra note 7 at 29. The power of a water conservancy district to levy and collect assessments within the district does not violate Section 14 of Article X of the ***Colorado*** Constitution since the section means only that a creditor of municipality may not levy upon and sell private property of individuals within the corporation to pay the municipality's debts. [*Rogers v. Letford, 79 P.2d 274, 288 (****Colo.*** *1938).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y3Y0-0040-01BD-00000-00&context=1516831) A water conservancy board has the duty to determine the extent of property necessary to be taken by virtue of its broad power. [*Kistler v. Northern* ***Colo.*** *Water Conservancy Dist., 246 P.2d 616, 618 (****Colo.*** *1952).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XJR0-0040-03V1-00000-00&context=1516831) Water conservancy districts are not public utilities subject to the regulation of the [*Public Utilities Commission. Matthews, 613 P.2d at 892.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1CK0-003D-91W5-00000-00&context=1516831) [↑](#footnote-ref-27)
27. 27 Id. [↑](#footnote-ref-28)
28. 28 Melinda Kassen, Symposium, Statutory Expansion of State Agencies' Authority to Administer and Develop Water Resources in Response to ***Colorado***'s Drought, [*7 U. Denv. Water L. Rev. 47, 73 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4C46-DK00-00SW-5004-00000-00&context=1516831) [↑](#footnote-ref-29)
29. 29 ***Colorado*** Water Conservation Board, Strategic Plan, 2 (2006). [↑](#footnote-ref-30)
30. 30 Kassen, supra note 28 at 79. [↑](#footnote-ref-31)
31. 31 Id. at 80-81; Hobbs, supra note 7 at 30. Indeed, the CWCB is also the agency leading the charge on ***Colorado*** water availability studies through the CDSS. See Exhibit [↑](#footnote-ref-32)
32. 32 Interview with David Freeman, supra note 5. [↑](#footnote-ref-33)
33. 33 Id. [↑](#footnote-ref-34)
34. 34 See ***Colo.*** Rev. Stat. [*§ 37-45-153*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2P5-00000-00&context=1516831) (2011); See also ***Colorado*** Water Conservation Board, ***Colorado*** Decision Support Systems, [*http://cdss.state.****co****.us/basins/Pages/****Colorado****.aspx*](http://cdss.state.co.us/basins/Pages/Colorado.aspx) [↑](#footnote-ref-35)
35. 35 Hobbs, supra note 7, at 29. [↑](#footnote-ref-36)
36. 36 See ***Colo.*** Rev. Stat. [*§ 37-92-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FS-00000-00&context=1516831) (2011) (listing the seven water divisions and the ***river*** drainages they represent); See D Topical Index, ***COLORADO*** DIVISION OF WATER RESOURCES, [*http://water.state.****co****.us/Home/Pages/DTopics.aspx*](http://water.state.co.us/Home/Pages/DTopics.aspx) (last visited July 6, 2010). Divisions are also largely referred to as "basins" in terms of the main-stem ***rivers*** of their respective divisions: e.g. Division 1 is commonly referred to as the "South Platte ***River*** Basin," Division 2 is commonly referred to as the "Arkansas ***River*** Basin," Division 4 is commonly referred to as the "Gunnison ***River*** Basin," Division 5 is commonly referred to as the "***Colorado*** ***River*** Basin," etc. [↑](#footnote-ref-37)
37. 37 Interview with Sarah Klahn, Partner, White & Jankowski (2009). [↑](#footnote-ref-38)
38. 38 See ***Colo.*** Rev. Stat. [*§ 37-92-301*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (2011); Trout, Witwer & Freeman, supra note 20, at 100. [↑](#footnote-ref-39)
39. 39 ***Colo.*** Rev. Stat. [*§ 37-92-301*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FY-00000-00&context=1516831) (2011); Trout, Witwer & Freeman, supra note 20, at 100. The division engineers, under the state engineer, oversee water rights administration through "water commissioners" in the various districts which comprise the divisions, described infra. [↑](#footnote-ref-40)
40. 40 Applicants submit applications for water rights to the clerk of the water court. Getches, supra note 10, at 165. After opportunity for opposition, the state engineer and subordinate officials provide the clerk with a list of decreed and conditional water rights. Id. "Conditional" water rights are "unperfected" rights and users must take substantial first steps towards putting unperfected water rights to beneficial use in order to make them "absolute." Trout, Witwer & Freeman, supra note 20, at 10. A referee makes a determination on water rights applications and refers difficult matters to the water judge. Getches, supra note 10, at 165. All parties have the opportunity to protest the ruling to the water judge and the judge confirms all rulings unless contrary to law. Id. Once confirmed, the water right is assigned a priority date as of the filing of the application. Id. at 166. Appellate review of the water court's judgment and decree moves straight to the ***Colorado*** Supreme Court. Id. [↑](#footnote-ref-41)
41. 41 Interview with Scott Hummer, District 36 Water Commissioner, (Apr. 19, 2010). [↑](#footnote-ref-42)
42. 42 Id. [↑](#footnote-ref-43)
43. 43 See District Board of Directors, UPPER GUNNISON ***RIVER*** WATER CONSERVANCY DISTRICT, [*http://www.ugrwcd.org/Pages/board%20and%20staff.htm*](http://www.ugrwcd.org/Pages/board%20and%20staff.htm) (last visited July 7, 2010). [↑](#footnote-ref-44)
44. 44 The Upper Gunnison Water Conservancy District lists as one of its principal mandates, "The Board will work diligently to be well informed about legal, political, engineering and other factors which will or might affect the water resources of the Upper Gunnison ***River*** Water Conservancy District. To this end the District will participate in activities deemed necessary to enforce its position opposing transfers of water from the headwaters of the Gunnison ***River*** to other basins." Upper Gunnison ***River*** Water Conservancy Dist., Position Statement on Transbasin Diversion (Aug. 28, 2000). [↑](#footnote-ref-45)
45. 45 Trout, Witwer & Freeman, supra note 19, at 76. [↑](#footnote-ref-46)
46. 46 Interview with Jennifer Pitt, Environmental Defense Fund (Jan. 2010). A 2007 report indicates that there were 1,494 total transfers for ***Colorado*** with 1,270 for municipal uses, but taking the C-BT project out of the picture, ***Colorado*** transfers (240 annually) are more comparable with those of California (303 total with 176 for municipal purposes), which is the site of the largest number of annual transfers since 1990. [↑](#footnote-ref-47)
47. 47 Trout, Witwer & Freeman, supra note 19, at 5-6. [↑](#footnote-ref-48)
48. 48 Id. [↑](#footnote-ref-49)
49. 49 Agriculture is a beneficial use in ***Colorado***. See ***Colo.*** Const. art. XVI, § 6. [↑](#footnote-ref-50)
50. 50 Klahn, supra note 38. [↑](#footnote-ref-51)
51. 51 Trout, Witwer & Freeman, supra note 19, at 25. [↑](#footnote-ref-52)
52. 52 Getches, supra note 10, at 131. [↑](#footnote-ref-53)
53. 53 Klahn, supra note 37. [↑](#footnote-ref-54)
54. 54 Interview with John Gerstle, Technical Advisor, Trout Unlimited, in Boulder, ***Colorado***, (Mar. 2009). [↑](#footnote-ref-55)
55. 55 ***Colo.*** Rev. Stat. [*§ 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2011). [↑](#footnote-ref-56)
56. 56 Id. [*§ 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831). [↑](#footnote-ref-57)
57. 57 [*Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 170 P.3d 307, 315 (****Colo.*** *2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R1D-NB00-TX4N-G0TY-00000-00&context=1516831)(holding that municipalities still have the burden of demonstrating that their conditional appropriations are not speculative and that the appropriations are "consistent with their reasonably anticipated water requirements based on substantiated projections of future growth within their service area")(emphasis added) (this refined the "municipality exception" to the anti-speculation doctrine under ***Colo.*** Rev. Stat. [*§ 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2011)). [↑](#footnote-ref-58)
58. 58 Trout, Witwer & Freeman, supra note 20, at 10. [↑](#footnote-ref-59)
59. 59 Id. at 10, 117-23; Getches, supra note 10, at 167-69. [↑](#footnote-ref-60)
60. 60 Trout, Witwer & Freeman, supra note 19, at 10, 117-23. [↑](#footnote-ref-61)
61. 61 Getches, supra note 10, at 168. [↑](#footnote-ref-62)
62. 62 ***Colo.*** Rev. Stat. [*§§37-92-103(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), -305(3) (2011); Trout, Witwer & Freeman, supra note 20, at 117-122. [↑](#footnote-ref-63)
63. 63 Trout, Witwer & Freeman, supra note 19, at 119-121; Getches, supra note 10, at 187-89. [↑](#footnote-ref-64)
64. 64 Doug Clements, Principal Water Res. Eng'r and Vice President, Spronk Water Eng'rs, Inc., Guest Lecturer, Water Law, University of Denver Sturm College of Law (Fall 2009); Sherwood, supra note 4, at 37. A plant "consumes" half by evaporation retention, and transpiration, the "historical consumptive use" ("HCU"). The rest flows or seeps back into the stream from ditches or fields or groundwater aquifers, etc, partly as return flow for other appropriators. Agricultural water use in terms of HCU was obtained wherever possible for agricultural water totals in Exhibit A, but difficult to always obtain. It is also important to bear in mind that agricultural land in Western states such as ***Colorado*** includes cropland, comprised of harvested, failed, abandoned, fallowed and cover crops and pasture and grazing lands; pastureland, comprised of grazing land; and woodland, comprised of pastured and unpastured land. [↑](#footnote-ref-65)
65. 65 ***Farmers Highline Canal & Reservoir, Co. v. City of Golden, 272 P.2d 629, 631 (Colo. 1954).*** [↑](#footnote-ref-66)
66. 66 Trout, Witwer & Freeman, supra note 19, at 119. [↑](#footnote-ref-67)
67. 67 ***Colo.*** Rev. Stat. [*§ 37-45-118(1)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (2011); Peter D. Nichols & Douglas S. Kenney, Watering Growth in ***Colorado***: Swept Along by the Current or Choosing a Better Line? [*6 U. Denv. Water L. Rev. 411, 423 (2003)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4992-DTD0-00SW-50K8-00000-00&context=1516831) (for further discussion of ***Colorado***'s "area-of-origin" mitigation statute see Section IV). [↑](#footnote-ref-68)
68. 68 Craig, supra note 25, at 793-94. [↑](#footnote-ref-69)
69. 69 MacDonnell, supra note 6, at 1. [↑](#footnote-ref-70)
70. 70 [*Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 70 P.3d 307, 315 (****Colo.*** *2007).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48T7-7FV0-0039-41YS-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 Nichols & Kenney, supra note 67, at 423 (additionally, "the larger and/or more senior the water right and the more significant the change, the more likelihood there is of injury, with a corresponding incentive for other appropriators to oppose the change," compounding potential water court transaction costs). [↑](#footnote-ref-72)
72. 72 Nichols & Kenny, supra note 67, at 423. [↑](#footnote-ref-73)
73. 73 Id. at 424; Getches, supra note 10, at 171. [↑](#footnote-ref-74)
74. 74 See id. at 168-173. [↑](#footnote-ref-75)
75. 75 See Water on the Rocks: Oil Shale Water Rights in ***Colorado***, Western Resources Advocates Appendix B (2009), available at [*http://www.westernresourceadvocates.org/land/wotrreport/wotrrep*](http://www.westernresourceadvocates.org/land/wotrreport/wotrrep) ort.pdf. Numerous companies hold significant but conditional or "unperfected" water rights for oil shale development in Western ***Colorado***. [↑](#footnote-ref-76)
76. 76 ***Colo.*** Rev. Stat. [*§ 37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)(2011); Nichols & Kenney, supra note 67, at 434; Trout, Witwer & Freeman, supra note 19, at 133. "Augmentation" under ***Colorado*** water law is a tool for providing water for new water uses if water is unavailable for appropriation in the traditional manner and involves a plan to replace out-of-priority depletions by junior uses in time, place, rate of diversion, and amount, with a substitute water supply. [↑](#footnote-ref-77)
77. 77 Nichols & Kenney, supra note 67, at 447-49. [↑](#footnote-ref-78)
78. 78 See Hobbs, supra note 7, at 19. [↑](#footnote-ref-79)
79. 79 Trout, Witwer & Freeman, supra note 19, at 180. [↑](#footnote-ref-80)
80. 80 Id. at 190. [↑](#footnote-ref-81)
81. 81 Interview with David Freeman, supra note 5. [↑](#footnote-ref-82)
82. 82 Trout, Witwer & Freeman, supra note 20 at 187. One notable exception to this is the Uncompahgre Valley Water Users' Association, which recently paid off its 100-year contract with the Reclamation for its irrigation works. [↑](#footnote-ref-83)
83. 83 Interview with Kyle Whitaker, Assistant Div. Eng'r, Div. 5, ***Colo.*** Div. of Water Res. (Feb. 24, 2010). [↑](#footnote-ref-84)
84. 84 Reed D. Benson, Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water, [*16 Va. Envtl. L.J. 363, 402-08 (1997).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-TWT0-00CV-S0XS-00000-00&context=1516831) [↑](#footnote-ref-85)
85. 85 Interview with Brian Werner, Pub. Info. Office, N. ***Colo.*** Water Conservancy Dist. (Apr. 14, 2010). [↑](#footnote-ref-86)
86. 86 Tri-County Water Conservancy District, Operating Policy, (2011), [*http://www.tricountywater.org/www/pdf/about/OperatingPolicy/*](http://www.tricountywater.org/www/pdf/about/OperatingPolicy/) Op\_policy.pdf (last visited, Jul. 3, 2010). [↑](#footnote-ref-87)
87. 87 See Upper Gunnison ***River*** Water Conservancy District, Activities Planned for 2010 (2010), [*http://www.ugrwcd.org/Pages/2010%20Activities.pdf*](http://www.ugrwcd.org/Pages/2010%20Activities.pdf) (last visited, Jul. 3, 2010). [↑](#footnote-ref-88)
88. 88 Interview with Taylor Hawes, ***Colo.*** ***River*** Program Dir., The Nature Conservancy (Feb. 17, 2010). [↑](#footnote-ref-89)
89. 89 ***Colo.*** Rev. Stat. [*§ 37-45-131*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2NC-00000-00&context=1516831) (2011). [↑](#footnote-ref-90)
90. 90Id. [*§§37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831); Id. [*§ 37-47-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2SN-00000-00&context=1516831) (2009); Trout, Witwer & Freeman, supra note 19, at 197. [↑](#footnote-ref-91)
91. 91 ***Colo.*** Rev. Stat. [*§ 37-42-113*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:6573-PGW3-GXF6-84V8-00000-00&context=1516831) (2011). [↑](#footnote-ref-92)
92. 92 Trout, Witwer & Freeman, supra note 19, at 192. Conservation and conservancy districts are often labeled "quasi-governmental" because the courts have had to differentiate them from public utilities, but are in fact, governmental entities, unlike the other water organization types. Both are subject to all the same taxing and open records laws as other governmental organs. Id. at 193, 197. A conservation district's landowners may pursue the creation of "subdistricts," which are also considered separate political subdivisions of the state, but generally use the same board membership. Id. at 196-197. [↑](#footnote-ref-93)
93. 93 Interview with David Freeman, supra note 5. The largely agricultural, and to a lesser extent, recreational, mandate of conservancy districts is also borne out by the case law. Conservancy and conservation districts have been party to countless lawsuits, too numerous to list, but have been fundamental in contributing to the evolution of water law in ***Colorado***. [↑](#footnote-ref-94)
94. 94 Trout, Witwer & Freeman, supra note 19, at 195. [↑](#footnote-ref-95)
95. 95 ***Colo.*** Rev. Stat. [*§§37-46-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PR-00000-00&context=1516831), -47-107, -48-105, -50-107 (2011). [↑](#footnote-ref-96)
96. 96 Id. [↑](#footnote-ref-97)
97. 97 Interview with Taylor Hawes, supra note 88. [↑](#footnote-ref-98)
98. 98 Kassen, supra note 28 at 75. [↑](#footnote-ref-99)
99. 99 The ***River*** District encompasses fifteen counties, the Upper ***Colorado*** ***River*** and its tributaries in all of Division 5 and parts of Division 4. About Us, ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_1*](http://www.crwcd.org/page_1) (last visited Aug. 30, 2011). Southwestern serves six counties and parts of three, the San Juan and Dolores ***Rivers*** and their tributaries (which are tributary to the ***Colorado***), all within Division 7. About Us, Southwestern Water Conservation District, [*http://swwcd.org/about-us*](http://swwcd.org/about-us) (last visited Aug. 30, 2011). [↑](#footnote-ref-100)
100. 100 Trout, Witwer & Freeman, supra note 19, at 195. [↑](#footnote-ref-101)
101. 101 See [*§§37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831), -47-101. [↑](#footnote-ref-102)
102. 102 Trout, Witwer & Freeman, supra note 19, at 196. [↑](#footnote-ref-103)
103. 103 Id. at 197. [↑](#footnote-ref-104)
104. 104 Id. at 192-193, 197. [↑](#footnote-ref-105)
105. 105 Interview with Taylor Hawes, supra note 88. [↑](#footnote-ref-106)
106. 106 Interview with Brian Werner, supra note 85. [↑](#footnote-ref-107)
107. 107 See infra Sections IV and V. [↑](#footnote-ref-108)
108. 108 [*§ 37-45-153(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2P5-00000-00&context=1516831) . [↑](#footnote-ref-109)
109. 109 Interview with David Freeman, supra note 5. [↑](#footnote-ref-110)
110. 110 Trout, Witwer & Freeman, supra note 19, at 191. [↑](#footnote-ref-111)
111. 111 Interview with Brian Werner, supra note 85; Interview with Bob Hamilton, Engineering Supervisor, Southeastern ***Colorado*** Water Conservancy District (Apr. 5, 2010). [↑](#footnote-ref-112)
112. 112 Interview with Bob Hamilton, supra note 111. [↑](#footnote-ref-113)
113. 113 Id. [↑](#footnote-ref-114)
114. 114 [*§§37-45-108*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MJ-00000-00&context=1516831) to -109 (2009) (outlining the requirements for creation of conservancy districts by petition, including, minimum valuation of irrigated land, $ 20 million dollars, and minimum required signatures of landowners with irrigated land within the district). [↑](#footnote-ref-115)
115. 115 Id. [*§ 37-45-114*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MS-00000-00&context=1516831). [↑](#footnote-ref-116)
116. 116 Id. [*§ 37-45-108*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2MJ-00000-00&context=1516831); [*Peaker v. Se.* ***Colo.*** *Water Conservancy Dist., 483 P.2d 232, 234 (****Colo.*** *1971).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1VC0-003D-904R-00000-00&context=1516831) [↑](#footnote-ref-117)
117. 117 Trout, Witwer & Freeman, supra note 19, at 192, 195. [↑](#footnote-ref-118)
118. 118 Id. at 192 [↑](#footnote-ref-119)
119. 119 Id. at 193. [↑](#footnote-ref-120)
120. 120 [*§ 37-45-121*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2N1-00000-00&context=1516831). [↑](#footnote-ref-121)
121. 121 Trout, Witwer & Freeman, supra note 19, at 193. [↑](#footnote-ref-122)
122. 122 [*§ 37-45-118(1)(b)(I)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-123)
123. 123 Id. [*§ 37-45-118(1)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-124)
124. 124 Id. [*§ 37-45-118(1)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-125)
125. 125 See, e.g., Water Marketing, ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_180*](http://www.crwcd.org/page_180) (last visited Oct. 1, 2011); ***Colorado*** ***River*** Water Conservation District, Yampa Water Supply Contract 5, [*http://www.crwcd.org/media/uploads/20110419\_contract*](http://www.crwcd.org/media/uploads/20110419_contract) \_water\_supply\_yampa.pdf (last visited Oct. 1, 2011). [↑](#footnote-ref-126)
126. 126 [*§ 37-45-134*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2NG-00000-00&context=1516831). [↑](#footnote-ref-127)
127. 127 Id. [↑](#footnote-ref-128)
128. 128 Trout, Witwer & Freeman, supra note 19, at 76. [↑](#footnote-ref-129)
129. 129 Id. [↑](#footnote-ref-130)
130. 130 Trout, Witwer & Freeman, supra note 20, at 194; Nichols & Kenney, supra note 67 at 424-425; ***Colo.*** Rev. Stat. [*§ 37-45-118(1)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831); See infra Section IV. [↑](#footnote-ref-131)
131. 131 [*City of Thornton v. Bijou Irrigation* ***Co****., 926 P.2d 1, 57 (****Colo.*** *1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) (holding "extra-district use is not per se impermissible," despite the fact that C.R.S. [*§ 37-45-118*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) evinces an intent that a conservancy district use the benefits of any water developed by the district within the boundaries of the district). The Water Conservancy Act, the repayment contract, and the rules enacted by Northern all "discourage[] and strictly limit[]" use of ***Colorado*** Big-Thompson water outside the boundaries of Northern. [*Id. at 57-58.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) See also infra Section IV (explaining contracts, statutes and board rules in the aggregate can present barriers to transfer). [↑](#footnote-ref-132)
132. 132 Trout, Witwer & Freeman, supra note 19, at 190. [↑](#footnote-ref-133)
133. 133 Id. [↑](#footnote-ref-134)
134. 134 Id. [↑](#footnote-ref-135)
135. 135 [*§ 37-41-101(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J295-00000-00&context=1516831). [↑](#footnote-ref-136)
136. 136 Trout, Witwer & Freeman, supra note 19, at 190. [↑](#footnote-ref-137)
137. 137 Id. [↑](#footnote-ref-138)
138. 138 Id. [↑](#footnote-ref-139)
139. 139 Id. [↑](#footnote-ref-140)
140. 140 Id. [↑](#footnote-ref-141)
141. 141 Id. [↑](#footnote-ref-142)
142. 142 Id. at 190-191. [↑](#footnote-ref-143)
143. 143 Id. at 191. [↑](#footnote-ref-144)
144. 144 Id. at 182. [↑](#footnote-ref-145)
145. 145 Id. [↑](#footnote-ref-146)
146. 146 Id. [↑](#footnote-ref-147)
147. 147 Getches, supra note 10, at 454-455. [↑](#footnote-ref-148)
148. 148 Trout, Witwer & Freeman, supra note 19, at 182-183. [↑](#footnote-ref-149)
149. 149 Id. [↑](#footnote-ref-150)
150. 150 Getches, supra note 10, at 455. [↑](#footnote-ref-151)
151. 151 Id. at 455-456 [↑](#footnote-ref-152)
152. 152 Id. at 454-455. [↑](#footnote-ref-153)
153. 153 Id. at 454. [↑](#footnote-ref-154)
154. 154 ***Colo.*** Rev. Stat. [*§ 7-42-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-X0W1-DYDC-J1F2-00000-00&context=1516831). [↑](#footnote-ref-155)
155. 155 Trout, Witwer & Freeman, supra note 19, at 185-186. [↑](#footnote-ref-156)
156. 156 Id. [↑](#footnote-ref-157)
157. 157 Id. [↑](#footnote-ref-158)
158. 158 Id. at 184. [↑](#footnote-ref-159)
159. 159 Interview with Kyle Whitaker, supra note 83. [↑](#footnote-ref-160)
160. 160 Trout, Witwer & Freeman, supra note 19, at 185. [↑](#footnote-ref-161)
161. 161 Id. at 185. [↑](#footnote-ref-162)
162. 162 Id. [↑](#footnote-ref-163)
163. 163 Id. at 186. [↑](#footnote-ref-164)
164. 164 Id. at 185-86. [↑](#footnote-ref-165)
165. 165 Getches, supra note 10, at 458-59. [↑](#footnote-ref-166)
166. 166 Getches, supra note 10, at 458. [↑](#footnote-ref-167)
167. 167 David F. Jankowski et al., Symposium, The 1969 Act's Contributions to Local Governmental Water Suppliers, [*3 U. Denv. Water L. Rev. 20, 34 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VW0-00C3-W0TS-00000-00&context=1516831) [↑](#footnote-ref-168)
168. 168 Kassen, supra note 28, at 74. If another water rights holder transfers water with different priorities to an MDC, MDCs have the ability to assign different classes of stock with different privileges and burdens to its stockholders. Getches, supra note 10, at 459. [↑](#footnote-ref-169)
169. 169 Data on specific incorporated MDCs is available through the ***Colorado*** Department of State in the form of "Entity Extracts" for $ 50 per submission, but because the entities are only searchable by title, often do not contain "mutual ditch" language in their title, and because MDCs can be registered as a number of different entity types, Domestic For Profit, Domestic LLC, etc., a proper search would be extremely tedious and costly. See ***Colorado*** Department of State Order Form for Entity Extract Listing, ***COLO.*** DEP'T. OF STATE, [*http://www.sos.state.****co****.us/pubs/business/PDFFillable/ENTITY\_*](http://www.sos.state.co.us/pubs/business/PDFFillable/ENTITY_) EXTRACT.pdf (last visited Oct. 2, 2011). [↑](#footnote-ref-170)
170. 170 Interview with David Freeman, supra note 5. [↑](#footnote-ref-171)
171. 171 Trout, Witwer & Freeman, supra note 19, at 187. [↑](#footnote-ref-172)
172. 172 Id. [↑](#footnote-ref-173)
173. 173 Id. [↑](#footnote-ref-174)
174. 174 Id. [↑](#footnote-ref-175)
175. 175 Id. at 188. [↑](#footnote-ref-176)
176. 176Transfers" for this table refer to all transfers, whether within a water organization district or external to a water organization district. The designation depends on the contract-specific terms. [↑](#footnote-ref-177)
177. 177 ***Colo.*** Rev. Stat. [*§§37-45-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2M9-00000-00&context=1516831) to -153. [↑](#footnote-ref-178)
178. 178 Id. [*§§37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831), -47-101. [↑](#footnote-ref-179)
179. 179 Id. [*§ 37-45-118*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-180)
180. 180 Id. [*§ 37-45-118(1)(b)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-181)
181. 181 Id. [*§ 37-45-118(1)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-182)
182. 182 Nichols & Kenney, supra note 67, at 424-25 & n.106. [↑](#footnote-ref-183)
183. 183 [*§ 37-45-118(1)(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831). [↑](#footnote-ref-184)
184. 184 Id. [*§ 37-45-121*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2N1-00000-00&context=1516831). [↑](#footnote-ref-185)
185. 185 See, e.g., Contract Between the United States and the Northern ***Colorado*** Water Conservancy District Providing for the Construction of the ***Colorado*** Big-Thompson Project, ***Colorado*** (Jul. 5, 1938), courtesy of Brian Werner, Northern ***Colorado*** Water Conservancy District (Apr. 14, 2010). [↑](#footnote-ref-186)
186. 186 [*City of Thornton, 926 P.2d at 57.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-187)
187. 187 [*Id. at 57-58.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YVT0-003D-916Y-00000-00&context=1516831) [↑](#footnote-ref-188)
188. 188 Craig, supra note 25, at 794; Trout, Witwer & Freeman, supra note 19, at 123. [↑](#footnote-ref-189)
189. 189 Craig, supra note 25, at 793-794 n.11. [↑](#footnote-ref-190)
190. 190 Trout, Witwer & Freeman, supra note 19, at 123-24. [↑](#footnote-ref-191)
191. 191 Id. at 124. [↑](#footnote-ref-192)
192. 192 Id. at 124-125. [↑](#footnote-ref-193)
193. 193 Id. at 123-125 (citing [***Colo.*** *Rev. Stat.§§37-92-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), -205, -302 (2009)). [↑](#footnote-ref-194)
194. 194 Craig, supra note 25, at 794. [↑](#footnote-ref-195)
195. 195 Id. at 794-95. [↑](#footnote-ref-196)
196. 196 Id. at 797. [↑](#footnote-ref-197)
197. 197 Id. at 805-06. [↑](#footnote-ref-198)
198. 198 Trout, Witwer & Freeman, supra note 19, at 168. [↑](#footnote-ref-199)
199. 199 Id. [↑](#footnote-ref-200)
200. 200 ***Colo.*** Rev. Stat. [*§ 37-81-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36P-00000-00&context=1516831); Olen Paul Matthews & Michael Pease, The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries, 46 Nat. Resources J. 601, 605 (2006) (citing Edward B. Shultz, Student Article, Water as an Article of Commerce: State Embargos Spring a Leak under Sporhase v. Nebraska, [*12 B.C. Envtl. Aff. L. Rev. 103, 106 (1985)).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3T-X8K0-00CW-12H1-00000-00&context=1516831) [↑](#footnote-ref-201)
201. 201 [*Matthews & Pease, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1CK0-003D-91W5-00000-00&context=1516831) note 200, at 605-06, 648-52. [↑](#footnote-ref-202)
202. 202 [*§ 37-81-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36P-00000-00&context=1516831). [↑](#footnote-ref-203)
203. 203 Id. at [*§ 37-81-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36T-00000-00&context=1516831). [↑](#footnote-ref-204)
204. 204 Id. at [*§ 37-81-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36P-00000-00&context=1516831). [↑](#footnote-ref-205)
205. 205 Id. [↑](#footnote-ref-206)
206. 206 See, e.g., [*Frontier Ditch* ***Co****. v. Se.* ***Colo.*** *Water Conservancy Dist., 761 P.2d 1117, 1118 (****Colo.*** *1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0Y20-003D-94NH-00000-00&context=1516831) (holding that the federal Arkansas ***River*** Compact, giving Kansas exclusive jurisdiction over water rights from Arkansas ***River*** tributaries, preempted conflicting ***Colorado*** constitutional provision on rights to unappropriated waters of natural streams.). [↑](#footnote-ref-207)
207. 207 [*§ 37-62-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33Y-00000-00&context=1516831). This article is ***Colorado***'s ratification of the Upper ***Colorado*** ***River*** basin compact. [↑](#footnote-ref-208)
208. 208 Federal ***river*** compacts, like other federal laws, preempt state law when the compact and state law conflict. See, e.g., [*Frontier Ditch* ***Co****. v. Se.* ***Colo.*** *Water Conservancy Dist., 761 P.2d 1117, 1123 (****Colo.*** *1988).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0Y20-003D-94NH-00000-00&context=1516831) [↑](#footnote-ref-209)
209. 209 [*Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953-54, 956, 959-60 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5D60-003B-S4C4-00000-00&context=1516831) (holding groundwater subject to Commerce Clause scrutiny despite the Court's affirmation of a state's compelling interest in its own water). [↑](#footnote-ref-210)
210. 210 [*Matthews & Pease, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1CK0-003D-91W5-00000-00&context=1516831) note 201, at 649-51. [↑](#footnote-ref-211)
211. 211 Id. at 650-51. [↑](#footnote-ref-212)
212. 212 Benjamin Harding, Principle Eng'r, AMEC Earth & Envtl. and Stratus Consulting, Update on ***Colorado*** ***River*** Water Availability Study at City of Boulder Water Resources Advisory Board Meeting, (Mar. 15, 2010), available at [*http://www.bouldercolorado.gov/index.php?option=com\_cont*](http://www.bouldercolorado.gov/index.php?option=com_cont) ent&view=article&id=12889&Itemid=2338. [↑](#footnote-ref-213)
213. 213 SWSI Report, supra note 1 at 3-5. The impact of SB 03-73 was not fully evaluated during the SWSI availability studies. [↑](#footnote-ref-214)
214. 214 ***Colo.*** Rev. Stat. [*§ 37-45-118(1)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (2009). [↑](#footnote-ref-215)
215. 215 Id. [*§§37-62-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33Y-00000-00&context=1516831) to -106. [↑](#footnote-ref-216)
216. 216 Hobbs, supra note 7, at 30. [↑](#footnote-ref-217)
217. 217 Id. [↑](#footnote-ref-218)
218. 218 Id. at 28. [↑](#footnote-ref-219)
219. 219 [*43 U.S.C. § 617*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73R7-00000-00&context=1516831) (1994). [↑](#footnote-ref-220)
220. 220 ***Colo.*** Rev. Stat. [*§§37-62-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33Y-00000-00&context=1516831) to -06 (2009). [↑](#footnote-ref-221)
221. 221 Id. § 101. [↑](#footnote-ref-222)
222. 222 Hobbs, supra note 7, at 29. [↑](#footnote-ref-223)
223. 223 ***Colo.*** Rev. Stat. [*§ 37-45-118*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (2009). [↑](#footnote-ref-224)
224. 224 Trout, Witwer & Freeman, supra note 19, at 76. [↑](#footnote-ref-225)
225. 225 Benson, supra note 84, at 371. [↑](#footnote-ref-226)
226. 226 Id. at 401. The federal government, according to the Ninth Circuit at least, retains sovereign control of the project, "unless surrendered in unmistakable terms." Id. [↑](#footnote-ref-227)
227. 227 Id. at 411. [↑](#footnote-ref-228)
228. 228 Trout, Witwer & Freeman, supra note 19, at 175. [↑](#footnote-ref-229)
229. 229 Benson, supra note 84, at 426-427. [↑](#footnote-ref-230)
230. 230 See infra Section V. [↑](#footnote-ref-231)
231. 231 Kassen, supra note 28, at 71-72. [↑](#footnote-ref-232)
232. 232 Id. at 73. [↑](#footnote-ref-233)
233. 233 Nichols & Kenney, supra note 67, at 428-429. [↑](#footnote-ref-234)
234. 234 About Us, ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_1*](http://www.crwcd.org/page_1) (last visited Sept. 13, 2011); ***Colorado*** ***River*** District History, ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_188*](http://www.crwcd.org/page_188) (last visited Sept. 13, 2011). [↑](#footnote-ref-235)
235. 235 About Us, ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_1*](http://www.crwcd.org/page_1) (last visited Sept. 13, 2011) [↑](#footnote-ref-236)
236. 236 ***Colorado*** ***River*** Water Conservation District, [*http://www.crwcd.org/page\_17*](http://www.crwcd.org/page_17) (last visited, Apr. 23, 2010). Agenda items for the April 2010 meeting included "Temporary water marketing contract with the Upper Yampa ***River*** Water Conservancy District for Elkhead Reservoir," a briefing on the Wild and Scenic Stakeholders process on the Uncompahgre and Lower ***Colorado*** ***Rivers***, and input on rule-making for implementation of House Bill 09-1303 for non-tributary groundwater. Id. [↑](#footnote-ref-237)
237. 237 ***Colo.*** Rev. Stat. [*§ 37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831) (2009). [↑](#footnote-ref-238)
238. 238 Id. [*§§37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831), -107. [↑](#footnote-ref-239)
239. 239 Water Marketing Policy of the ***Colorado*** ***River*** Water Conservation District's ***Colorado*** ***River*** Water Projects Enterprise for the Yampa ***River*** Basin, ***Colorado*** ***River*** Water Conservation District, (Apr. 19, 2011), [*http://www.crwcd.org/media/uploads/20110419\_policy\_*](http://www.crwcd.org/media/uploads/20110419_policy_) water\_marketing\_yampa.pdf. [↑](#footnote-ref-240)
240. 240 Id. at 1. [↑](#footnote-ref-241)
241. 241 Id. at 2 (providing that the Enterprise's Ruedi Reservoir supply is contracted through the Bureau of Reclamation, but the federal component of the water marketing contracts is not analyzed here). [↑](#footnote-ref-242)
242. 242 Id. [↑](#footnote-ref-243)
243. 243 Id. [↑](#footnote-ref-244)
244. 244 Id. at 3. [↑](#footnote-ref-245)
245. 245 Id. at 5 [↑](#footnote-ref-246)
246. 246 Id. [↑](#footnote-ref-247)
247. 247 Id. at 3-6. [↑](#footnote-ref-248)
248. 248 Id. at 6. [↑](#footnote-ref-249)
249. 249 Id. at 2. [↑](#footnote-ref-250)
250. 250 Id. at 7 [↑](#footnote-ref-251)
251. 251 Id. at 8. [↑](#footnote-ref-252)
252. 252 The ***Colorado***-Big Thompson Project, Northern ***Colorado*** Water Conservancy District, [*http://www.ncwcd.org/project\_features/cbt\_main.asp*](http://www.ncwcd.org/project_features/cbt_main.asp) (last visited September 11, 2011). [↑](#footnote-ref-253)
253. 253 Werner, supra note 85. [↑](#footnote-ref-254)
254. 254 Board of Directors, Northern ***Colorado*** Water Conservancy District, [*http://www.ncwcd.org/ncwcd\_about/board\_of\_*](http://www.ncwcd.org/ncwcd_about/board_of_) director.asp (last visited September 11, 2011). [↑](#footnote-ref-255)
255. 255 The ***Colorado***-Big Thompson Project, Northern ***Colorado*** Water Conservancy District, [*http://www.ncwcd.org/project\_features/cbt\_main.as*](http://www.ncwcd.org/project_features/cbt_main.as) p (last visited September 11, 2011). [↑](#footnote-ref-256)
256. 256 Id. [↑](#footnote-ref-257)
257. 257 Werner, supra note 85. [↑](#footnote-ref-258)
258. 258 Id. [↑](#footnote-ref-259)
259. 259 Id. [↑](#footnote-ref-260)
260. 260 Id. [↑](#footnote-ref-261)
261. 261 Id. [↑](#footnote-ref-262)
262. 262 Id. Class D transfers are slightly more complex since liens are perpetual on the land but still only require an application to Northern. Id. [↑](#footnote-ref-263)
263. 263 WUS-NCWCD Contract, supra note 185. [↑](#footnote-ref-264)
264. 264 Id. [↑](#footnote-ref-265)
265. 265 Id. [↑](#footnote-ref-266)
266. 266 Id. at 24 [↑](#footnote-ref-267)
267. 267 Werner, supra note 85. [↑](#footnote-ref-268)
268. 268 WUS-NCWCD Contract, supra note 185. [↑](#footnote-ref-269)
269. 269 Id. [↑](#footnote-ref-270)
270. 270 Id. [↑](#footnote-ref-271)
271. 271 Id. [↑](#footnote-ref-272)
272. 272 Steve Porter, Water District Aims to Shut Down Speculators, Northern ***Colorado*** Business Report (May 9, 2008), [*http://ncbr.com/article.asp?id=93237*](http://ncbr.com/article.asp?id=93237). [↑](#footnote-ref-273)
273. 273 Hamilton, supra note 111. [↑](#footnote-ref-274)
274. 274 Id. [↑](#footnote-ref-275)
275. 275 Allocation Principles, Southeastern ***Colorado*** Water Conservancy District (November 29, 1979), [*http://www.secwcd.org/Allocation/Allocation%20Principles%201979.pdf*](http://www.secwcd.org/Allocation/Allocation%20Principles%201979.pdf). [↑](#footnote-ref-276)
276. 276 Id. [↑](#footnote-ref-277)
277. 277 Id.; see also infra Exhibit A. [↑](#footnote-ref-278)
278. 278 See id. ("1. Supplemental water can only be sold to ditch or canal companies with decreed rights and 2: Project Water will be sold to municipalities and domestic water users associations within the District, and will be supplemental only unless otherwise agreed upon by the Board of Directors.") [↑](#footnote-ref-279)
279. 279 See id. [↑](#footnote-ref-280)
280. 280 History and Description of the Fryingpan-Arkansans Project, Southeastern ***Colorado*** Water Conservancy District, [*http://www.secwcd.org/History%20and%20Description.htm*](http://www.secwcd.org/History%20and%20Description.htm). (last visited Sept. 9, 2011). [↑](#footnote-ref-281)
281. 281 Id. [↑](#footnote-ref-282)
282. 282 Operating Principles, Fryingpan-Arkansas Project, H.R. 91, 87th Cong. (1959), available at [*http://www.secwcd.org/Allocation/Fry-Ark%20Project%20Operating%20Principles%20(1961).pdf*](http://www.secwcd.org/Allocation/Fry-Ark%20Project%20Operating%20Principles%20). [↑](#footnote-ref-283)
283. 283 Id. [↑](#footnote-ref-284)
284. 284 History and Description of the Fryingpan-Arkansans Project, Southeastern ***Colorado*** Water Conservancy District, [*http://www.secwcd.org/History%20and%20Description.htm*](http://www.secwcd.org/History%20and%20Description.htm). (last visited Sept. 9, 2011). [↑](#footnote-ref-285)
285. 285 Id. [↑](#footnote-ref-286)
286. 286 Id. (providing that demand often exceeds supply because the Arkansas ***River*** system is usually over-appropriated). [↑](#footnote-ref-287)
287. 287 Id. [↑](#footnote-ref-288)
288. 288 Id. [↑](#footnote-ref-289)
289. 289 Id. [↑](#footnote-ref-290)
290. 290 Id. [↑](#footnote-ref-291)
291. 291 Hamilton, supra note 111. [↑](#footnote-ref-292)
292. 292 Allocation Principles, Southeastern ***Colorado*** Water Conservancy District (November 29, 1979), [*http://www.secwcd.org/Allocation/Allocation%20Principles%201979.pdf*](http://www.secwcd.org/Allocation/Allocation%20Principles%201979.pdf). [↑](#footnote-ref-293)
293. 293 UGRWCD website, Upper Gunnison ***River*** Water Conservancy District, [*http://www.ugrwcd.org*](http://www.ugrwcd.org) (last visited Nov. 9, 2011). [↑](#footnote-ref-294)
294. 294 Upper Gunnison ***River*** Water Conservancy District, District Manual, Historical Perspective, Accomplishments, the Future 1 (2009), [*http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf*](http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf). [↑](#footnote-ref-295)
295. 295 See id. at 2. [↑](#footnote-ref-296)
296. 296 Id. at 6. [↑](#footnote-ref-297)
297. 297 Id. at 3. [↑](#footnote-ref-298)
298. 298 Id. [↑](#footnote-ref-299)
299. 299 Id. at 16. [↑](#footnote-ref-300)
300. 300 Id. at 5. [↑](#footnote-ref-301)
301. 301 Id. at 17. [↑](#footnote-ref-302)
302. 302 See In re Decree of the Upper Gunnison Water Conservancy Dist., Civil Action No. 5618 (Colo Dist. 7 1959), available at [*http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf*](http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf). [↑](#footnote-ref-303)
303. 303 Petition for Forming Water Conservancy District, In re Upper Gunnison Water Conservancy Dist., Civil Action No. 5618 (Colo Dist. 7 1959), available at [*http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf*](http://www.ugrwcd.org/Pages/District%20Manual%20Updated.pdf). [↑](#footnote-ref-304)
304. 304 Id. [↑](#footnote-ref-305)
305. 305 Id. [↑](#footnote-ref-306)
306. 306 Nichols & Kenney, supra note 67 at 448. [↑](#footnote-ref-307)