

# [***CASENOTE & COMMENT: SAVE SOME FOR THE FISHES: ANALYZING THE ST. JUDE'S CO. DECISION AND WHAT IT MEANS FOR BENEFICIAL USE IN COLORADO***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5NHS-C3C0-00CV-N0BH-00000-00&context=1516831)

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**Text**

**[\*808]**

Introduction

"Whiskey is for drinking and water is for fighting over." Nowhere is that quote, often attributed to Mark Twain, truer than in the arid lands of ***Colorado***. [[1]](#footnote-2)1 In the 1874 Water Wars, a conflict over water on the Cache la Poudre ***River*** claimed several lives, including a judge shot in his courtroom. [[2]](#footnote-3)2 Today's fights still take place in the courtroom (thankfully without gunplay), yet they are no less controversial. With fewer than twenty inches of annual rainfall, [[3]](#footnote-4)3 the life and livelihood of many Coloradoans depends on their ability to get and keep water rights. [[4]](#footnote-5)4

***Colorado*** administers water rights under the prior appropriation system, where a water right is acquired through the physical diversion of water away from its stream bed and, most importantly, applied to a beneficial use. [[5]](#footnote-6)5 In St. Jude's ***Co***. **[\*809]** v. Roaring Fork, LLC, [[6]](#footnote-7)6 the ***Colorado*** Supreme Court ignored precedent by altering the definition of beneficial use in a way that will have far-reaching and detrimental impacts for ***Colorado***. The court's decision to categorically exclude aesthetic, recreational, and piscatorial uses as beneficial is contrary to the statutory and common law history of ***Colorado*** water law. [[7]](#footnote-8)7 This decision could have both environmental and economic impacts as it will restrict the development of nonconsumptive uses of water. Barring a reversal of the decision, the only viable solution is to amend [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) to include aesthetic, recreational, and piscatorial uses of water as beneficial for the purposes of acquiring a water right in ***Colorado***.

This Note first analyzes the legal background of water rights law in ***Colorado***, discussing specifically how water rights are acquired, and then introduces the factual background of the St. Jude's ***Co***. decision. Next, it critiques that decision and highlights various problems that could arise as a result. Finally, this Note offers a potential solution to those problems, in the form of an amendment to [***Colo.*** *Rev. Stat. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), which would again allow for beneficial aesthetic, recreational, and piscatorial uses.

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

A. Legal Background

The outcome of this case, and perhaps the future of water law in ***Colorado***, depends on how "beneficial use" is defined. However, because ***Colorado*** water law is so unique, a general overview of the ***Colorado*** Doctrine [[8]](#footnote-9)8 is required to better understand the intricacies and potential fallout - including the environmental and economic consequences - from the St. **[\*810]** Jude's ***Co***. decision.

1. How to Acquire a Water Right in ***Colorado***

Water rights in ***Colorado*** are distributed under the doctrine of prior appropriation. This system - as opposed to the riparian system, in which property owners own the water that borders their property [[9]](#footnote-10)9 - is best understood as "first in time, first in right." [[10]](#footnote-11)10 Therefore, whoever is the first party to claim the water (the senior) has a right to that water over all subsequent appropriators (the juniors). [[11]](#footnote-12)11 That means that the senior can call [[12]](#footnote-13)12 for its entire water right before the first junior can divert, and the first junior must get its entire right before the next junior can divert, and so on and so forth down the line until the entire stream is appropriated. [[13]](#footnote-14)13

The prior appropriation system was in place in ***Colorado*** before statehood, [[14]](#footnote-15)14 and was later ratified by the ***Colorado*** Constitution. [[15]](#footnote-16)15 In the ensuing decades, courts and the ***Colorado*** General Assembly have stepped in to impose certain stipulations regarding how users can claim a water right in **[\*811]** the state. Most notably, the water must be "diverted" [[16]](#footnote-17)16 and put to a "beneficial use." [[17]](#footnote-18)17 While both terms have been disputed and litigated throughout ***Colorado***'s history, the St. Jude's ***Co***. case turns on the definition of beneficial use and what specific uses can qualify as beneficial for the purposes of appropriating a water right under ***Colorado*** law. The beneficial use requirement was created as a matter of policy in an attempt to ensure that ***Colorado***'s limited water was used to achieve maximum benefits. [[18]](#footnote-19)18 The legislature did not want users to waste water, or stockpile it, when other users could have been putting it to beneficial use, thereby spurring development across the state. [[19]](#footnote-20)19

Although beneficial use has largely been defined by the **[\*812]** courts, in 1969 the ***Colorado*** General Assembly passed the Water Right Determination and Administration Act, which defined beneficial use as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." [[20]](#footnote-21)20 This is an undoubtedly broad definition; however, the General Assembly has since amended the law to mention specific beneficial uses, including impoundment of water for firefighting, fishing, recreation, recreational in-channel diversions [[21]](#footnote-22)21 (although not for private parties), and the state's instream flow program. [[22]](#footnote-23)22 Importantly, the statute clearly states that the list of those beneficial uses does not limit "the generality of the previous sentence." [[23]](#footnote-24)23 As a result, decrees [[24]](#footnote-25)24 have been issued for numerous other beneficial uses throughout the state, including groundwater recharge, silviculture (controlling the growth and health of forests), and snowmaking. [[25]](#footnote-26)25

2. Beneficial Use at Common Law

The ***Colorado*** Constitution does not define either "use" or "beneficial use." [[26]](#footnote-27)26 Although the Constitution mentions a preference for domestic, agricultural, and manufacturing **[\*813]** uses, [[27]](#footnote-28)27 what other uses can qualify as beneficial is a question of fact for the courts to decide. [[28]](#footnote-29)28 Exactly how and why courts have decided what uses are beneficial will be examined in depth in the critique of the St. Judes's ***Co***. decision below.

B. Factual Background

Roaring Fork Club, L.L.C. (the Club) is a private golf, fishing, recreational, and residential resort near Basalt, ***Colorado***. [[29]](#footnote-30)29 In March 2007, the Club filed two water applications in Water Division 5. [[30]](#footnote-31)30 In the first application, "the Club sought a decree for new appropriative rights and a change in the point of diversion for an existing right." [[31]](#footnote-32)31 The application claimed that "since 2001, the Club had diverted 21 cubic feet per second (cfs) from the Roaring Fork ***River***." [[32]](#footnote-33)32 The Club had been diverting the water into the RFC Ditch (the Ditch), a flow-through structure located entirely on the Club's property, before returning the water to the Roaring Fork ***River*** approximately one-half mile downstream. [[33]](#footnote-34)33 The Club was using the water for an "aesthetic and recreational amenity to a golf course development, … fish habitat and … a private fly-fishing stream." [[34]](#footnote-35)34 Therefore, the application sought the water for "aesthetic, recreational, and piscatorial uses." [[35]](#footnote-36)35

St. Jude's ***Co***., an agricultural business, filed a statement **[\*814]** of opposition to the Club's application. [[36]](#footnote-37)36 St. Jude's ***Co***. alleged that it had "water rights in the Roaring Fork ***River***, that it currently diverted at the RFC Headgate [[37]](#footnote-38)37 and through the Ditch, and that its rights would be adversely affected" if the Club's application was granted. [[38]](#footnote-39)38 At trial, the court "found that the Club had applied its proposed water right … to beneficial use." [[39]](#footnote-40)39 Specifically, the trial court found that the Ditch was stocked and fished by the Club and that the higher flow rates made fishing more challenging. [[40]](#footnote-41)40 The court also found that the Ditch was "an amenity and feature" of the Club's golf course, that the Ditch was enjoyed as a "visual aesthetic amenity," and that the higher flows amounted to "a better visual quality… in support of its aesthetic purpose." [[41]](#footnote-42)41 Consequently, the water court decreed the Club the rights for "aesthetic, recreational, and piscatorial uses." [[42]](#footnote-43)42 St. Jude's ***Co***. then appealed to the ***Colorado*** Supreme Court; [[43]](#footnote-44)43 after briefing and oral argument, the court ordered supplemental briefing on the question of whether "a diversion into and through a ditch for piscatorial and aesthetic purposes, without impoundment, is a beneficial use under ***Colorado*** water law." [[44]](#footnote-45)44

C. Holding

The ***Colorado*** Supreme Court drastically altered the definition of beneficial use in ***Colorado*** when it held that aesthetic, recreational, and piscatorial uses are not beneficial for the purposes of prior appropriation. [[45]](#footnote-46)45 As mentioned above, there were several different claims brought before the ***Colorado*** **[\*815]** Supreme Court. [[46]](#footnote-47)46 However, it is the court's ruling on what constitutes a beneficial use that will have widespread impacts on ***Colorado***. According to the majority opinion, "the Club failed to demonstrate an intent to apply the amount of water for which it sought a decree to any beneficial use." [[47]](#footnote-48)47 In essence, the majority found that aesthetic, recreational, and piscatorial uses were categorically not beneficial under either "the constitution or [the] statutes." [[48]](#footnote-49)48

D. Critique of the Decision

When both the statutory and common law history of beneficial use in ***Colorado*** is examined, it is clear that the Club's three uses fit any standard of beneficial use that has been used to date. Justice Marquez dissented in part and concurred in part, [[49]](#footnote-50)49 concluding that not only are aesthetic, recreational, and piscatorial uses beneficial under ***Colorado*** water law, but also that the record in the St. Jude's ***Co***. case supports the water court's finding that the Club needed the applied for amount to sustain those uses. [[50]](#footnote-51)50 This section critiques six sub-holdings of the case to show that aesthetic, recreational, and piscatorial uses all fall well within any definition of beneficial use.

The most important finding of the court was that not only did the Club fail to demonstrate that aesthetic, recreational, and piscatorial uses were beneficial in this case, it is likely that they never could be. [[51]](#footnote-52)51 The majority could have said that the Club simply failed to demonstrate how their uses were beneficial. Instead, the court went one step further to say that it is likely that those uses never could be beneficial under ***Colorado*** water law. [[52]](#footnote-53)52 To reach this finding, the court relied on ***Colorado*** ***River*** Water Conservation District v. Rocky Mountain **[\*816]** Power ***Co***. [[53]](#footnote-54)53 In that case, the court denied an appropriation where the water was not diverted but rather "preserved and kept in the stream … for the preservation of fish life and the propagation of fish." [[54]](#footnote-55)54 The St. Jude's ***Co***. court then used that precedent to hold that "the right to the maintenance of the "flow' of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation." [[55]](#footnote-56)55 But the majority failed to recognize that the Rocky Mountain Power ***Co***. appropriation was not denied because of its piscatorial purpose, but rather because the water was never diverted from the stream. [[56]](#footnote-57)56 In fact, the Rocky Mountain Power ***Co***. court even implied that a minimum flow for piscatorial purposes could be appropriated so long as the water was diverted from the natural course of the stream. [[57]](#footnote-58)57 Therefore, the St. Jude's ***Co***. decision to categorically exclude the uses from ever being beneficial went far beyond the scope of Rocky Mountain Power ***Co***.

1. The Definition of "Beneficial Use" Is Not Limited by Either Art. XVI, Sec. 6, of the ***Colorado*** Constitution or [*C.R.S. Section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831).

Article XVI, section 6, of the ***Colorado*** Constitution states that "priority of appropriation shall give the better right as between those using the water for the same purpose" before stating a preference for the possible purposes of domestic, agricultural, and manufacturing uses. [[58]](#footnote-59)58 Although the ***Colorado*** Constitution prioritizes domestic uses first, and agricultural uses over manufacturing, it is clear that the text does not limit appropriations to those three uses. In 1999, the ***Colorado*** Supreme Court held that the meaning of beneficial use "tracks **[\*817]** legislative enactments, court decisions, and, principally, the acts of appropriators who control water to their purposes." [[59]](#footnote-60)59

One such legislative enactment was [***Colo.*** *Rev. Stat. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), which defines "beneficial use" as the "amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." [[60]](#footnote-61)60 Beyond that general statement, the legislature also explicitly listed several specific beneficial uses, where the "impoundment of water for firefighting or storage" includes "recreational, fishery, or wildlife purposes." [[61]](#footnote-62)61 The statute goes on to outline recreational in-channel diversions [[62]](#footnote-63)62 (RICD) - an option not available to private parties - and the state's instream flow (ISF) program. Importantly, the General Assembly made clear that the list of examples of possible beneficial uses is not exhaustive. The statute explicitly says the list is not intended to "limit the generality" of the broad definition of beneficial use, and that any use that is "reasonable and appropriate under reasonably efficient practices" will be considered beneficial. [[63]](#footnote-64)63

2. Statutes and Common Law Have Both Recognized Fishing as a Beneficial Use

The majority opinion states that the Club "clearly cannot be said to apply [its] water to a "beneficial use.'" [[64]](#footnote-65)64 However, one of the Club's principal uses of the water was fishing, and both statutes and common law recognize fishing as a beneficial use. Section 103(4)(a) specifically lists the storage of water for "recreational, fishery, and wildlife purposes" as per se beneficial. [[65]](#footnote-66)65 While it is true that the Club was merely diverting the water through the Ditch, and not storing or impounding it in any way, Justice Marquez made a compelling point in her in part concurrence and in part dissent that there is no **[\*818]** meaningful distinction between fishing in a reservoir [[66]](#footnote-67)66 and fishing in a flow-through diversion. [[67]](#footnote-68)67 She reasoned that section 103(4)(a) clarifies that recreational, fishery, or wildlife purposes can support a storage right because the storage of water itself is not enough to claim an appropriation. [[68]](#footnote-69)68 That explains "why the legislature would identify the storage of water for recreational, fishery, or wildlife purposes … without explicitly recognizing the right to a flow-through diversion for the same purpose." [[69]](#footnote-70)69 To demonstrate how absurd this distinction is, imagine if the Club simply impounded the water into its own private lake for fishing (like in Three Bells Ranch Associations) [[70]](#footnote-71)70 and then released it in controlled amounts back into the ***river*** - thereby "accidentally" creating a fly fishing stream. This would likely be acceptable as a beneficial use, and so it seems illogical to require the extra step of impoundment.

As another example, here is a hypothetical situation that could be allowed under the St. Jude's ***Co***. decision: A private party could build a dam to control their water from their diversion before sending it downstream in their private ditch before returning the water to the original stream. By building a dam, this new appropriation could possibly be valid under two different standards. First, the appropriation would be an "impoundment of water … for which an appropriation is lawfully made, including recreational, fishery, or wildlife purposes." [[71]](#footnote-72)71 Technically, this set-up would fit the definition, although it would not be the fishing pond contemplated by the legislature, and therefore it is likely that the ***Colorado*** Supreme Court would eliminate this work-around of the law.

However, the private party would have a stronger **[\*819]** argument that this type of diversion structure - a dam controlling the water into a new channel - is exactly what the court allowed in City of Thornton v. City of Fort Collins. [[72]](#footnote-73)72 Because this diversion structure moves the water to a new channel, and does not simply control it instream like an RICD, it should be governed by the common law and not the statutory restrictions of an RICD. Clearly, this result is absurd and not what the court likely had in mind when attempting to redefine beneficial use. However, because the possibility to simply work around the court's restrictions exists, the argument against fishing as a beneficial use does not carry much weight.

Additionally, fishing has long been recognized at common law as a beneficial use in ***Colorado***. In Faden v. Hubbell, the court recognized a flow-through water right for a fish hatchery. [[73]](#footnote-74)73 While the majority in St. Jude's ***Co***. differentiated Faden on other grounds, [[74]](#footnote-75)74 it is important to note that a flow-through right in connection with fishing was found to be beneficial. [[75]](#footnote-76)75 Again in 1992 the ***Colorado*** Supreme Court recognized that a water right could be appropriated on flowing water for recreational, fishery, or wildlife purposes. [[76]](#footnote-77)76 In City of Thornton v. City of Fort Collins, the ***Colorado*** Supreme Court concluded that the City of Fort Collins' uses were "recreational, piscatorial, and wildlife uses, all valid under the [1969] Act." [[77]](#footnote-78)77 Fort Collins had applied for those rights in conjunction with the diversion of water from its natural course into a new channel. [[78]](#footnote-79)78 Importantly, the court in that case noted that, "the exclusive authority vested in the CWCB [***Colorado*** Water Conservation Board] to appropriate minimum stream flows does not detract from the right to divert and put to beneficial use unappropriated waters by removal or control." [[79]](#footnote-80)79

So even though the ***Colorado*** General Assembly later, and **[\*820]** partly in response to the Fort Collins decision, passed the RICD statute, [[80]](#footnote-81)80 the principle that an appropriator can claim a water right for a diversion (unlike an RICD where the water remains instream) remained good law, at least until the St. Jude's ***Co***. decision. Therefore, it is telling that the legislature, when given the opportunity, chose to continue to allow these types of beneficial uses, so long as the water was diverted from the stream.

3. The Majority Opinion Improperly Construed "Use" as a Verb

The majority opinion made a point to note the definition of "use" and why aesthetic, recreational, and piscatorial uses do not qualify under that standard. [[81]](#footnote-82)81 In particular, the majority cited a dictionary definition of "use" as "to put into action or service." [[82]](#footnote-83)82 The court then attempted to show why a use must be "active" [[83]](#footnote-84)83 to meet that narrow dictionary definition. However, that is an inapt analysis because the ***Colorado*** Constitution does not require that water be "used" (a verb) but rather that it be put to "beneficial use" (a noun). [[84]](#footnote-85)84 And if the court wants the definition of "beneficial use," a dictionary is not required because the ***Colorado*** General Assembly defined the term at [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [[85]](#footnote-86)85 Within that definition, case law has shown that "beneficial" is much more crucial to the validity of a water right than mere "use." [[86]](#footnote-87)86

**[\*821]** To be clear, the issue is not that the majority used a dictionary to define terms in the statute - although it was unnecessary given that the statue already contains definitions. Rather, the problem is that the majority opinion took the time to analyze and define the term "use" as a verb, when the word only appears as the compound noun "beneficial use." Therefore, whether the water is being "used" should not be a point of analysis for the court. The only inquiry that needs to be made is whether or not the water is being put to a beneficial use. As a result, the entire section of the opinion discussing the definition of "use" is unnecessary.

4. The Court's Decision to Distinguish Between "Active" and "Passive" Uses is Not Supported by Statute or Common Law

The court next attempted to make a distinction between "active" and "passive" uses of water. [[87]](#footnote-88)87 For the reasons discussed above, [[88]](#footnote-89)88 the type of use does not matter so long as it is beneficial. However, the court chose not to follow this rule, but instead used the St. Jude's ***Co***. situation to craft a new rule: that in order to be beneficial under [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), the use of water must be "active." [[89]](#footnote-90)89 The court used several old cases to show that all prior beneficial uses in ***Colorado*** have been active. [[90]](#footnote-91)90 Because the only thing that matters is whether the use is beneficial, [[91]](#footnote-92)91 drawing a distinction between active and passive uses is completely arbitrary. Not only that, but it is an irrelevant distinction because the turning point is, and always has been, whether the use is beneficial. [[92]](#footnote-93)92

**[\*822]** However, the court insisted that "the "uses' delineated by the Club are entirely passive … amounting to "uses' only in the sense that someone derives enjoyment from the water in its diverted state." [[93]](#footnote-94)93 The court then listed several prior "innovative" uses that are still more active than the Club's aesthetic, recreational, and piscatorial uses. [[94]](#footnote-95)94 Specifically, the court highlighted Vance v. Wolfe, where the ***Colorado*** Supreme Court found a beneficial use for the water used in the production of coalbed methane (CBM). [[95]](#footnote-96)95 In that case, a group of ranchers argued that the use was "beneficial" and therefore would require the drilling company to appropriate a junior water right. [[96]](#footnote-97)96 The court held that because CBM uses water "by extracting it from the ground and storing it in tanks … to "accomplish' a particular "purpose'" - the release of methane gas - "the extraction of water to facilitate CBM production is therefore a "beneficial use.'" [[97]](#footnote-98)97 Additionally, the court went a step further by citing Vance in a parenthetical for the proposition that the decision "emphasized that coalbed methane processes use[] a particular quantity of water as is necessary to release methane gas trapped by it." [[98]](#footnote-99)98 While CBM production clearly uses some quantity of water, nothing in that **[\*823]** section of Vance mentions, let alone emphasizes, that specific quantity, or why that amount is beneficial. [[99]](#footnote-100)99 This stretches the actual holding in Vance in an attempt to further differentiate it from the facts in St. Jude's ***Co***. and to draw an artificial line between active and passive uses of water. [[100]](#footnote-101)100

Because nothing in the statutes governing beneficial use, or the subsequent developments in the common law, uses an active or passive test to differentiate between beneficial and non-beneficial uses of water, there is no reason to institute such an arbitrary standard.

5. It is Already Common Practice to Determine What Amount of Water is Reasonable, Appropriate, or Efficient

The majority opinion took issue with the fact that the necessary amount of water for appropriations under aesthetic, recreational, and piscatorial uses is often difficult to quantify. [[101]](#footnote-102)101 The court noted the distinction that piscatorial uses could be limited to fish production, like in Faden, because the results of the piscatorial use in that case were easily quantifiable. [[102]](#footnote-103)102 But, if "yielding measurable results" [[103]](#footnote-104)103 was the only criteria for ensuring a piscatorial use was beneficial, then surely the Club's financial records and fly fishing sales would be an objective [[104]](#footnote-105)104 standard by which to measure its use. **[\*824]** Instead, the court focused on the Club's creation of a "more challenging recreational fishing experience" as a subjective standard by which the reasonableness of a piscatorial water right could not be determined. [[105]](#footnote-106)105

By making this distinction, the court posited the idea that determining the amount of water that is reasonable, appropriate, efficient, etc., for a subjective experience is impossible. [[106]](#footnote-107)106 However, the common law and statutes both contain examples of how that quantity of water can be determined. In ***Colorado*** Water Conservation Board v. Upper Gunnison Water Conservancy District, the court held that expert testimony could determine how much water was necessary for a "reasonable recreational experience" on that particular stream. [[107]](#footnote-108)107 That meant the water court would "be required to weigh conflicting expert testimony given by course designers or other interested parties, and make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience." [[108]](#footnote-109)108

In the constant struggle to efficiently use the water of the state, [[109]](#footnote-110)109 the requirement that the court determine the minimum amount of water necessary for a reasonable recreation experience is important. That language effectively puts a check on the fears that appropriators would tie up massive amounts of stream water unnecessarily, thereby resulting in an overall inefficiency. [[110]](#footnote-111)110 Because the plaintiffs in that case could show both that the appropriation was for a reasonable recreational experience, and that their application was for the minimum amount of water necessary to achieve **[\*825]** that experience, the appropriation was valid under the RICD statute and the ***Colorado*** Constitution. [[111]](#footnote-112)111

Additionally, the ***Colorado*** RICD statute [[112]](#footnote-113)112 itself states that municipalities can appropriate the amount of water necessary for a reasonable recreational experience. [[113]](#footnote-114)113 Exactly what that means - and how much water it means for each appropriation - has been a highly controversial subject. [[114]](#footnote-115)114 However, the important point is that it has been litigated. Regardless of the outcomes in any of those cases, the court has never taken issue with whether or not that amount can be determined. Therefore, it is already common practice to determine the reasonable, appropriate, and efficient amount of water necessary for recreational uses. It would have been fair for the court to rule that the Club never determined (or offered the necessary evidence for) what amount was necessary for aesthetic, recreational, and piscatorial uses. However, the court went too far in saying that reasonable amounts could never be determined for Roaring Fork's uses.

**[\*826]**

6. Decrees Have Been Issued in Several Different Water Districts for Flow-Through Rights for Aesthetic, Recreational, and Piscatorial Uses

By holding that aesthetic, recreational, and piscatorial uses are not beneficial under ***Colorado*** law, the court went against the common law practice already in place throughout the state. Specifically, we can look at Water Divisions 3, 4, and 5 for examples of how these water rights are already working to promote the maximum utilization of the waters of ***Colorado***. Water Division No. 3 (the Rio Grande ***River*** in south-central ***Colorado***) has decreed flow-through rights for "recreation, piscatorial [uses], and fish and wildlife habitat." [[115]](#footnote-116)115 Water Division No. 4 (the Gunnison ***River*** on the Western Slope) has allowed appropriations for "piscatorial and recreational use in a trout fishery" and, very similar to the Club's diversion, for a "Fishing Stream" and an "Amenity Stream." [[116]](#footnote-117)116 Finally, Water Division No. 5 (the main stem of the ***Colorado*** ***River***) has issued decrees for "piscatorial, recreation, and fish and wildlife habitat enhancement purposes." [[117]](#footnote-118)117

The fact that multiple water divisions across the state have already issued decrees for these uses shows it is already widely accepted across the state that aesthetic, recreational, and piscatorial diversions are clearly beneficial uses in ***Colorado***. In addition to the statutory objections discussed above, [[118]](#footnote-119)118 these current appropriations show that the court's decision here was counter to the existing common law as well. While it is certainly within the court's purview to overrule lower court decisions, the unanimous precedent supporting the three uses - combined with the negative effects that will result from this decision - confirm that aesthetic, recreational, and piscatorial flow-through diversions should remain beneficial uses.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). Problems resulting from the St. Jude's ***Co***. decision

While much of the analysis of the decision is academic, its **[\*827]** effects will be felt throughout the state in practice. Because appropriations will no longer be allowed, both private development and environmental preservation will suffer. Additionally, while it is unknown if, or how many existing water rights for aesthetic, recreational, and piscatorial uses will be challenged, all current rights appropriated under those uses could be in jeopardy.

A. No Further Rights Will Be Granted for Aesthetic, Recreational, or Piscatorial Uses

Currently, no further water rights will be granted for aesthetic, recreational, or piscatorial uses. [[119]](#footnote-120)119 This will affect the further development of ***Colorado***'s economy by limiting the types of development that can occur. Specifically, the state needs non-consumptive uses of water to generate further development. Additionally, private parties monitor their water rights much more closely than the state can monitor its ISF appropriations, [[120]](#footnote-121)120 and therefore allowing appropriations for aesthetic, recreational, and piscatorial uses is important for environmental preservation.

1. Limiting Economic Development of Non-Consumptive Uses

Because almost all of the water in ***Colorado*** is already appropriated, non-consumptive uses of water are critical for future economic development. Under the ***Colorado*** ***River*** Compact, the "upper basin states" [[121]](#footnote-122)121 are required to send 75 **[\*828]** million acre-feet (maf) [[122]](#footnote-123)122 of ***Colorado*** ***River*** water to the lower basin states every ten years. [[123]](#footnote-124)123 This division of water was done on the presumption that there were at least 16.4 maf in the ***Colorado*** ***River*** annually; so the upper and lower basin states were each entitled to half, or 7.5 maf. [[124]](#footnote-125)124 Within that 7.5 maf allotted to the Upper Basin, ***Colorado*** is entitled to 51.75 percent, or approximately 3.86 maf. [[125]](#footnote-126)125 However, the exact amount of water in the ***Colorado*** ***River*** is now being called into question. [[126]](#footnote-127)126 Some experts believe that ***Colorado*** still has water left to appropriate, but the general consensus is that the state is fully appropriated, or even over-appropriated. [[127]](#footnote-128)127 Regardless of which report is accurate, it is generally agreed that ***Colorado*** must utilize non-consumptive uses in order to continue to grow its economy. [[128]](#footnote-129)128

To be sure, the ***Colorado*** ***River*** does not account for all of the water in the state. However, being the largest basin, it serves as a snapshot with which to analyze the water deficit throughout the state. If the waters of ***Colorado*** are over-appropriated, then appropriators are unlikely to get their **[\*829]** water in all but the wettest of years. [[129]](#footnote-130)129 Therefore, the only way to ensure continued economic development in ***Colorado*** is through non-consumptive uses. [[130]](#footnote-131)130 A hypothetical ***river*** situation illustrates how this works in practice.

The Sample ***River*** is completely appropriated to 120 percent of average streamflow levels. Any user wanting to develop a business that needs consumptive water rights (agricultural, industrial, etc.) would probably not be able to develop because of the uncertainty of getting his water. However, a businessman with a plan to develop a club (similar to Roaring Fork) with non-consumptive water uses - such as the aesthetic, recreational, or piscatorial uses in St. Jude's ***Co***. - would be able to develop. In practice, the businessman would be able to take the water out of the ***river***, put it to a beneficial, non-consumptive use, and then return it to the ***river*** where it would again be available to downstream senior users. [[131]](#footnote-132)131 In that scenario, no senior water rights are harmed, but the opportunity exists for more development. That opportunity is taken away if aesthetic, recreational, and piscatorial uses are categorially excluded as beneficial.

Water-related recreation generates more than $ 9 billion and 80,000 jobs annually in ***Colorado***. [[132]](#footnote-133)132 Fishing, water sports, and wildlife viewing alone account for more than $ 3 million annually. [[133]](#footnote-134)133 Much of this is on public waters, but a lot of this revenue is generated on private property such as the Club. [[134]](#footnote-135)134 **[\*830]** Because there is a huge market for water-related recreation, continuing to develop this market is crucial for the continual growth of the ***Colorado*** economy. Since ***Colorado*** is almost - or already - out of water, non-consumptive development is the only way to grow that sector.

2. Private Non-Consumptive Uses are Critical for Environmental Preservation.

Private water rights holders are much better positioned than the state to monitor their water rights, and private non-consumptive uses are therefore critical for environmental preservation. The ***Colorado*** ISF program is unique among the western states in that the state, through the CWCB, must apply for the ISF water right; it is a junior right, and it can be challenged in court. [[135]](#footnote-136)135 Currently, ***Colorado*** holds title to more than 1,600 ISF rights. [[136]](#footnote-137)136 Many of the rights are small, and often they are in remote reaches of high mountain streams. [[137]](#footnote-138)137 Consequently, it is extremely difficult for the CWCB to monitor all of the state's ISFs. [[138]](#footnote-139)138 In fact, the 2015 Basin Implementation Plan for the Yampa/White/Green Basin found that many ISFs in the basins were being shorted, some by as much as 50 percent, and many others by more than 25 percent. [[139]](#footnote-140)139 Some of the shortages can be attributed to overall water shortages in the basin and, as a junior right, the ISFs are consequently the first affected. [[140]](#footnote-141)140 However, much of the basin has been at or near average snowpack levels (with the exception of 2012), and the ISFs being shorted therefore cannot **[\*831]** simply be explained by the weather. [[141]](#footnote-142)141 That means the most likely explanation is that other water users are taking more than their decree amounts.

Theoretically, the state should monitor its ISFs. [[142]](#footnote-143)142 However, this is much easier said than done. Because ***Colorado*** holds so many ISFs and has relatively little monitoring or manpower, [[143]](#footnote-144)143 it is simply impossible for the CWCB to ensure that every ISF is getting its decreed water right. With no one to monitor the state ISFs, it becomes easy for other water users to take slightly more than their right, even if unintentionally. [[144]](#footnote-145)144 This is especially true for smaller ISFs, which make up the majority of the state's appropriations. [[145]](#footnote-146)145 When this is compounded, the result is that the ISF - and consequently the natural environment it was appropriated to protect - suffer.

This will eventually lead to several detrimental consequences because ISFs are crucial to the protection of the natural environment, as well as the economic development, of ***Colorado*** water. [[146]](#footnote-147)146 ISFs are appropriated by the state for a number of reasons: waterfowl habitat, preservation of threatened and endangered fish habitat, riparian vegetation, and glacial ponds. [[147]](#footnote-148)147 This unique system provides legal protection for the natural environment through a permanent, fully adjudicated water right. [[148]](#footnote-149)148 These rights protect flow-through on a defined reach of stream, not just at a bypass point, [[149]](#footnote-150)149 and have legal standing in water court to protect **[\*832]** against injury at any point within that instream flow reach. [[150]](#footnote-151)150

So what can be done to better protect ISFs? One solution would be to allow private citizens to appropriate water rights for aesthetic, recreational, and piscatorial uses. All of these uses leave water in the stream, thereby "preserving the natural environment to a reasonable degree." [[151]](#footnote-152)151 Because private users more effectively monitor their water rights, these appropriations are much less likely to be shorted than ISFs. [[152]](#footnote-153)152 And if the right is shorted, private parties are much more likely to notice, and therefore file a complaint with the Water Engineer and remedy the shortage. [[153]](#footnote-154)153 Consequently, allowing private parties to appropriate water for aesthetic, recreational, and piscatorial uses would augment the state's ISF program and help to preserve the natural environment for all ***Colorado*** citizens.

B. Status of Current Appropriations Based on the Beneficial Use of Water for Aesthetic, Recreational, or Piscatorial Purposes

The court's opinion in St. Jude's ***Co***. could potentially be stretched and read to say that it is possible to prove beneficial use from aesthetic, recreational, and piscatorial uses, and that the Club was just unable to do so. [[154]](#footnote-155)154 While this is probably a reach, [[155]](#footnote-156)155 what could a future applicant do differently than the Club to ensure that its appropriation of water for an aesthetic, recreational, or piscatorial use was beneficial? If an existing water right was now challenged on the basis of its aesthetic, **[\*833]** recreational, or piscatorial use for not being beneficial, [[156]](#footnote-157)156 the owner would need to show that the water was being put to a distinguishable purpose and that the water would be efficiently used and not wasted. [[157]](#footnote-158)157

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), the court made it clear that it wants the water to be put to a distinguishable purpose. [[158]](#footnote-159)158 The court took issue with the Club's uses because "beauty, excitement, or fun cannot even conceptually be qualified." [[159]](#footnote-160)159 The court then mentioned that the legislature has provided for how RICDs can be quantified but for some reason failed to extend these quantifiable, scientific measurements to the Club's uses. [[160]](#footnote-161)160 Therefore, if a water rights owner with appropriations for aesthetic, recreational, or piscatorial uses had enough scientific research to quantify the amount of water needed to satisfy its uses, perhaps the court would be more willing to find a beneficial use.

Along that same line of thought, the court was worried that because aesthetic, recreational, and piscatorial uses cannot be quantified, those appropriations will result in the wasteful use of water. [[161]](#footnote-162)161 The same expert testimony that proves how much water is necessary for the "reasonable recreational experience" could then be used, like in the case of RICDs, to determine the minimum amount necessary and thereby prevent waste. RICDs must function in such a way as to "promote maximum utilization of the waters of the state." [[162]](#footnote-163)162 The court seemed to hold that, among other reasons, aesthetic, recreational, and piscatorial uses are not beneficial because they would not achieve this standard. [[163]](#footnote-164)163 However, because the **[\*834]** waters of ***Colorado*** may already be over-appropriated, [[164]](#footnote-165)164 these non-consumptive uses are in fact the best way to maximize utilization of the waters of the state. If the all of the water that was appropriated was the minimum amount necessary for a reasonable recreational experience, this could help allay the court's fears of inefficiency and waste.

1. All Current Appropriations May Now be Awaiting Challenge

Notwithstanding the possibility that a water rights owner could still prove an aesthetic, recreational, or piscatorial appropriation, [[165]](#footnote-166)165 it seems likely that all such appropriations are now in jeopardy. In theory, any of these water rights could now be challenged in water court, and it is likely that the water rights owners would lose and thereby forfeit their right. To clarify, no current water rights owners automatically forfeit their rights as a result of the St. Jude's ***Co***. decision. [[166]](#footnote-167)166 However, it is likely that if those rights were challenged on the basis of beneficial use, the water court would follow the St. Jude's ***Co***. precedent and fail to find those uses as beneficial.

The loss of a water right for these private businesses will not only limit the future growth of ***Colorado***'s economy but, if the water rights are forfeited, will also have a negative effect on the current economy. There are dozens of fly fishing ranches throughout the state, in addition to countless other resorts and retreats that use water for aesthetic and recreational purposes. [[167]](#footnote-168)167 Many of the clients that visit these ranches and resorts come from out of state; the forfeiture of their water rights could result in the ranches and resorts failing, which would in turn result in the loss of tourism dollars upon which that the ***Colorado*** economy is so dependent. [[168]](#footnote-169)168 Therefore, not **[\*835]** only does the categorical exclusion of aesthetic, recreational, and piscatorial uses as beneficial limit the growth of ***Colorado***'s economy in the future, it could also have a detrimental effect on current tourism opportunities.

In sum, the St. Jude's ***Co***. decision was incorrect to categorically exclude aesthetic, recreational, and piscatorial uses as beneficial. Both the statute and relevant case law indicate that the three uses are well within the established bounds of beneficial use. Excluding these three uses threatens current appropriations, hinders further non-consumptive use development, and removes the possibility of private water rights preserving the environment as pseudo-ISFs.

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

So what can be done to remedy the potential issues created by the categorical exclusion of aesthetic, recreational, and piscatorial uses as beneficial? The longest-lasting solution would be to amend the beneficial use definition to allow flow-through appropriations for aesthetic, recreational, and piscatorial uses. In fact, this is the "solution" that has been suggested by the ***Colorado*** Supreme Court. [[169]](#footnote-170)169 The court said, "it is for the General Assembly to approve such unconventional beneficial uses, as it has done with its instream and RICD provisions." [[170]](#footnote-171)170 Essentially, the court acknowledged that, if the people of ***Colorado*** want aesthetic, recreational, and piscatorial uses to be valid as beneficial, then they (through the ***Colorado*** General Assembly) can make that change. [[171]](#footnote-172)171 The court also cited People v. Emmert as further reinforcing this point: "if the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end." [[172]](#footnote-173)172 Amending **[\*836]** the beneficial use definition would help to clear up the current ambiguity surrounding the term, while also allowing the legislature to set whatever limits it deems necessary for aesthetic, recreational, and piscatorial uses.

But the pressing issue here is what would those limits be, and how could they be set in such a way that would "promote maximum utilization of the waters of the state"? [[173]](#footnote-174)173 Setting these boundaries ensures that only the minimum amount necessary is appropriated and that the water is used efficiently with minimal waste. Because there is a statutory mandate to "promote maximum utilization of the waters of the state," [[174]](#footnote-175)174 appropriations that benefit only a very small number of people while hurting the population as a whole should be avoided.

One potential cap could be the imposition of a flow rate limit on appropriations for aesthetic, recreational, and piscatorial uses (e.g., the maximum appropriation for a piscatorial use is 20 cfs). For piscatorial uses, this would be problematic because the habitat in which trout (the main sport fish in ***Colorado***) can live is remarkably diverse. [[175]](#footnote-176)175 That means that a tiny stream with a flow rate of 6 cfs and the main stem of the ***Colorado*** - with flows of over 20,000 cfs [[176]](#footnote-177)176 - could both provide a reasonable recreational experience. Essentially, this would be a limitless "limit," and therefore unworkable. Even the staunchest defenders of piscatorial use could not support an appropriation of hundreds of cfs on a major ***river*** for trout fishing. Similarly, both tiny streams and mighty ***rivers*** have aesthetic value, so it would be hard - if not impossible - to set a limit for aesthetic appropriations. Private recreational uses, however, could be subject to a "reasonable recreational experience" limit - just like their counterpart RICDs - although this would only work if "recreation" was limited to whitewater, **[\*837]** a clearly erroneous assumption.

Perhaps flow-through diversions could be limited only to certain uses, then, but only ones that are measureable and quantifiable. As it stands, the ***Colorado*** Supreme Court would simply say that those appropriations are limited to beneficial uses, of which aesthetic, recreational, and piscatorial do not qualify. [[177]](#footnote-178)177 However, for the reasons discussed above, [[178]](#footnote-179)178 recreational and piscatorial uses are beneficial at the very least. Because the court expressed a concern that the use be measureable, [[179]](#footnote-180)179 allowing recreational and piscatorial but not aesthetic use could be a good compromise.

From a policy standpoint, one of the main reasons to not allow these flow-through diversions for aesthetic, recreational, and piscatorial uses is that the waters of the state are held in trust for the people of ***Colorado***, and allowing these appropriations - where the water will only be used by those wealthy enough to afford the expensive private clubs and resorts - is therefore counter to the ***Colorado*** Constitution. [[180]](#footnote-181)180 However, even though the ***Colorado*** Constitution says that the waters are held in trust for the people of ***Colorado***, that is only the case until it is appropriated. [[181]](#footnote-182)181 But it does seem to be poor public policy to allow only the upper class to be able to take advantage of the state's tremendous natural resources. However, if we do not allow these uses, then that water could be appropriated by agriculture or municipalities with the same result. To clarify, while it may be more "agreeable" to the public if a common farmer has a water right rather than a multimillionaire, the end result - that the general public cannot personally benefit from the water - is the same. So even though we may prefer the rancher to the real estate mogul on an emotional level, the final outcome is identical, and the law should reflect that reality.

With that in mind, the best solution would be to allow for flow-through diversions for aesthetic, recreational, and piscatorial uses, but only so long as that same use is not **[\*838]** materially injured in the reach of stream parallel to the flow-through diversion. Essentially, this would pair a private flow-through diversion with a corresponding ISF. The minimum required flow on the original reach would be based on the character and nature of the stream. A mix of qualitative and quantitative analysis would provide sufficient flexibility to determine the reasonable flowrate necessary to preserve the qualities of the original stream.

So if a private club wished to build a ditch on their property and appropriate a flow-through diversion for piscatorial uses, they would be allowed to do so, so long as the piscatorial uses of the original reach of the stream were not materially impaired. To ensure that the water left in the original stream would not be later appropriated (by agriculture or municipalities), the state would claim an ISF in an amount necessary to sustain piscatorial uses on the reach of the original stream that flows parallel to the private party's flow-through diversion. The public would not benefit directly from the ISF in the specific reach of the stream (because most of these diversions will likely occur on private property anyway), however, ensuring the protection of that reach of the stream works to protect all downstream waters to which the public may have access. If there was only enough water in the stream to support the flow-through right - and not a corresponding ISF - then the appropriation would be denied because it would not "promote maximum utilization of the waters of the state." [[182]](#footnote-183)182 While this would preclude development, it would do so on a much smaller scale than simply categorically excluding aesthetic, recreational, and piscatorial uses as the court has chosen to do in St. Jude's ***Co***. In fact, allowing these uses - even in a mildly restricted fashion as proposed here - creates more economic development by promoting nonconsumptive uses.

The best way to accomplish this would be to amend [*C.R.S. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831), with a cross-reference to [*C.R.S. section 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831). The language would look something like this (new language in bold):

(4) "Beneficial use" means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose **[\*839]** for which the appropriation is lawfully made. Without limiting the generality of the previous sentence, "beneficial use" includes:

…

(d) The diversion of water for a flow-through feature for aesthetic, recreational, or piscatorial purposes. This use will be valid only if:

(i) The application is accompanied by an instream flow application from the CWCB to preserve the specified use in the corresponding reach of the original stream, as contemplated in section 37-92-102(3); and

(ii) That instream flow will not be materially damaged by the applicant's proposed flow-through diversion for aesthetic, recreational, or piscatorial purposes;

(iii) For this section only, "materially damaged" means that the People of ***Colorado*** can no longer enjoy a reasonable recreational experience on that reach of the original stream, for the same purpose as the flow-through diversion.

The opposition to this plan would use the same arguments already made against ISFs: that they tie up water and limit development. [[183]](#footnote-184)183 However, these ISFs would both allow for development parallel to the specified reach and preserve the water for downstream development. This would act as a check on aesthetic, recreational, and piscatorial diversions because the water right owner would be able to appropriate water up to the amount that does not hurt the corresponding use in the original stream reach.

**[\*840]**

Conclusion

The ***Colorado*** Supreme Court erred in St. Jude's ***Co***. v. Roaring Fork, L.L.C., by categorically excluding aesthetic, recreational, and piscatorial uses as beneficial under ***Colorado*** water law. Both the statutory and common law history suggest that the three uses are, have been, and should be valid as beneficial uses in ***Colorado***. As it currently stands, all water rights owners with appropriations based on aesthetic, recreational, and piscatorial uses are in jeopardy of losing their water when challenged. This could have extremely detrimental consequences for the current ***Colorado*** water-based recreation economy and could severely hinder future nonconsumptive use development. There is a slight possibility that this decision could be challenged by a water rights owner who uses a dam to control and divert the water into his own channel, however this is a long shot. [[184]](#footnote-185)184 The most practical and long-lasting solution would be to amend the language of [*C.R.S. section 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [[185]](#footnote-186)185 By allowing private properties to divert water for aesthetic, recreational, and piscatorial purposes but also creating a corresponding ISF in the original stream reach, we will be able to find the common ground between parties and maximize the utility of the waters of ***Colorado***.

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1. 1 Whiskey Is For Drinking; Water Is For Fighting Over, Quote Investigator (June 3, 2013), [*http://quoteinvestigator.com/2013/06/03/whiskey-water/*](http://quoteinvestigator.com/2013/06/03/whiskey-water/) [[*https://perma.cc/L7YK-YZYJ*](https://perma.cc/L7YK-YZYJ)]. [↑](#footnote-ref-2)
2. 2 Jessie Romero, Water Wars, 17 Econ. Focus 38, 38 (2013). [↑](#footnote-ref-3)
3. 3 Nolan Doesken et al., The Plains of ***Colorado***, ***Colorado*** Climate Center, [*http://climate.colostate.edu/climateofcolorado.php*](http://climate.colostate.edu/climateofcolorado.php) (last updated Jan. 2003) [[*https://perma.cc/46B3-E3U9*](https://perma.cc/46B3-E3U9)]. The average annual rainfall in ***Colorado*** is only seventeen inches. Id. [↑](#footnote-ref-4)
4. 4 See The 100th Meridian, Neb. State Historical Soc'y (2004), [*http://www.nebraskahistory.org/publish/markers/texts/100th\_meridian.htm*](http://www.nebraskahistory.org/publish/markers/texts/100th_meridian.htm) [[*https://perma.cc/4SA5-9CKN*](https://perma.cc/4SA5-9CKN)] (describing how lands west of the 100th Meridian typically receive less than twenty inches of rainfall annually and therefore must be irrigated in order to grow crops). [↑](#footnote-ref-5)
5. 5 Gregory J. Cliffton & Paul J. Zilis, Recent Developments in Appropriations for Instream Uses, 22 ***Colo.*** Law. 987, 987 (1993). [↑](#footnote-ref-6)
6. 6 [*351 P.3d 442, 452 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-7)
7. 7 See infra section I.D.2. [↑](#footnote-ref-8)
8. 8 The ***Colorado*** Doctrine is another name for the prior appropriation system of water rights adjudication. Theron Josephson, ***Colorado*** Doctrine, Encyclopedia of the Great Plains (2011), [*http://plainshumanities.unl.edu/*](http://plainshumanities.unl.edu/) encyclopedia/doc/egp.wat.006 [[*https://perma.cc/8CT6-6D28*](https://perma.cc/8CT6-6D28)]. The doctrine originated in ***Colorado*** (hence the name) in the late 1800s. Id. Several other mountain west states, including Wyoming (1896), New Mexico (1900), and Montana (1921) have since adopted a version of the ***Colorado*** Doctrine. Id. [↑](#footnote-ref-9)
9. 9 Riparian Doctrine, Legal Info. Inst., [*https://www.law.cornell.edu/wex/*](https://www.law.cornell.edu/wex/) riparian\_doctrine (last visited Mar. 15, 2016) [[*https://perma.cc/3UKR-HPH6*](https://perma.cc/3UKR-HPH6)]. [↑](#footnote-ref-10)
10. 10 Sarah A. Klahn, The ***Colorado*** Doctrine of Prior Appropriation, in 2A ***Colo.*** Prac., Methods of Practice § 76:1 (6th ed. West 2016). [↑](#footnote-ref-11)
11. 11 Id. [↑](#footnote-ref-12)
12. 12 A call is a senior water right owner asking the division water engineer for enforcement of his water right in a situation where he is not getting his full decree. Water Rights Dictionary, ***Colo.*** Dep't of Nat. Res., [*http://water.state.****co****.us/SurfaceWater/SWRights/Pages/WaterRightsTerminology.aspx*](http://water.state.co.us/SurfaceWater/SWRights/Pages/WaterRightsTerminology.aspx) (last visited Feb. 25, 2017) [[*https://perma.cc/G72W-7H7Y*](https://perma.cc/G72W-7H7Y)]. The call is put in to the division water engineer, who then analyzes the amount of water currently in the stream. Id. The engineer may then shut off junior water right owners' headgates or undertake other similar steps to ensure that the senior gets its water. Id. The call establishes the water right priority required to divert and has a specific date and time; after that only those users senior to the call may divert. Id. [↑](#footnote-ref-13)
13. 13 Id. [↑](#footnote-ref-14)
14. 14 [*Armstrong v. Larimer Cty. Ditch* ***Co****., 27 P. 235, 237-38 (****Colo.*** *App. 1891).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3VW7-5100-0039-4514-00000-00&context=1516831) [↑](#footnote-ref-15)
15. 15 The ***Colorado*** Constitution provides: "The water of every natural stream … is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." ***Colo.*** Const. art. XVI, § 5. Additionally, "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied," and "priority of appropriation shall give the better right." Id. § 6. In 1882, the ***Colorado*** Supreme Court definitively held that no waters in ***Colorado*** were to be governed by the riparian system - prior appropriation was the law of the land. [*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) [↑](#footnote-ref-16)
16. 16 [***Colo.*** *Rev. Stat. section 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) defines "divert" as follows:

    removing water from its natural course or location, or controlling water in its natural course or location, by means of a control structure, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device; except that, on and after January 1, 2001, only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may file an application to control water in its natural course or location by means of a control structure for recreational in-channel diversions.

    [***Colo.*** *Rev. Stat. § 37-92-103(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). Diversion is mentioned only once in the ***Colorado*** Constitution and was not a statutory element of prior appropriation until the Water Right Determination and Administration Act of 1969. Cliffton & Zillis, supra note 5, at 987. Courts have split on exactly how much diversion is required. Id. In 1960, the ***Colorado*** Supreme Court held that the "only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use." [*Town of Genoa v. Westfall, 349 P.2d 370, 378 (****Colo.*** *1960).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-X3B0-0040-01T5-00000-00&context=1516831) The court reached that decision after stating that the "true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial." Id. (citing [*Thomas v. Guiraud, 6* ***Colo.*** *531, 553 (1883)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-3060-0040-03CW-00000-00&context=1516831) Following the Town of Genoa decision, it appeared that the diversion issue was settled, but only five years later the same ***Colorado*** Supreme Court denied an application for the appropriation of water for fishery enhancement. See [***Colo.******River*** *Water Conserv. Dist. v. Rocky Mtn. Power* ***Co****., 406 P.2d 798 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) The ***Colorado*** Supreme Court held that maintaining a natural stream flow for the enhancement of fish life could not constitute an appropriation because it did not involve an actual diversion of water from the stream. [*Id. at 800.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-17)
17. 17 ***Colo.*** Const. art. VXI, § 6; [*Dallas Creek Water* ***Co****. v. Huey, 933 P.2d 27, 34 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RH5-SXG0-003D-9002-00000-00&context=1516831) ("A water right comes into existence by applying state water to beneficial use."). [↑](#footnote-ref-18)
18. 18 See generally Charles F. Wilkinson, Crossing the Next Meridian: Land, Water, and the Future of the West 231-35 (1992). [↑](#footnote-ref-19)
19. 19 See generally Barton H. Thompson, Jr., John D. Leshy & Robert H. Abrams, Legal Control of Water Resources 192-94 (5th ed., 2013). [↑](#footnote-ref-20)
20. 20 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). [↑](#footnote-ref-21)
21. 21 See discussion infra, section I.D.1. [↑](#footnote-ref-22)
22. 22 [***Colo.*** *Rev. Stat. § 37-92-103(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)-(c). In 1973, the ***Colorado*** General Assembly amended the 1969 Act by giving the ***Colorado*** Water Conservation Board (CWCB) the authority to appropriate "minimum stream flows" to "preserve the natural environment to a reasonable degree." See Cliffton & Zilis, supra note 5, at 988; [***Colo.*** *Rev. Stat. § 37-92-102(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831). The instream flow program was later challenged, and upheld, as constitutional. [***Colo.*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 573 (****Colo.*** *1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) (holding that diversion is not a constitutional requirement of an appropriation because "divert" appears only once in the Constitution and that reference was merely intended to "negate any thought that ***Colorado*** would follow the riparian doctrine in the acquisition and use of water"). [↑](#footnote-ref-23)
23. 23 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [↑](#footnote-ref-24)
24. 24 A decree is the "official document issued by the court defining the priority, amount, use, and location of the water right." R. Waskom & M. Neibauer, Glossary of Water Terminology, ***Colo.*** St. Univ. Extension (May 2012), [*http://extension.colostate.edu/topic-areas/agriculture/glossary-of-water-terminology-4-717/*](http://extension.colostate.edu/topic-areas/agriculture/glossary-of-water-terminology-4-717/) [[*https://perma.cc/ZQE5-YTAU*](https://perma.cc/ZQE5-YTAU)]. [↑](#footnote-ref-25)
25. 25 What Are Beneficial Uses?, Produced Water Treatment & Beneficial Use Info. Ctr., ***Colo.*** Sch. of Mines, [*http://aqwatec.mines.edu/produced\_water/*](http://aqwatec.mines.edu/produced_water/) intro/what/index.htm (last visited Feb. 15, 2016) [[*https://perma.cc/N6T2-UAJR*](https://perma.cc/N6T2-UAJR)]. [↑](#footnote-ref-26)
26. 26 ***Colo.*** Const. art. XVI,§§5-6. [↑](#footnote-ref-27)
27. 27 Id. § 6. [↑](#footnote-ref-28)
28. 28 [*City & Cty. of Denver v. Sheriff, 96 P.2d 836, 842 (****Colo.*** *1939)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) ("What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case."). [↑](#footnote-ref-29)
29. 29 [*St. Jude's* ***Co****. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 446 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-30)
30. 30 Id. Water disputes in ***Colorado*** are handled through the state's system of water courts. Water Courts, ***Colo.*** Jud. Branch, [*https://www.courts.state.****co****.us/*](https://www.courts.state.co.us/) Courts/Water/ (last visited Jan. 24, 2016) [[*https://perma.cc/T59L-MN7J*](https://perma.cc/T59L-MN7J)]. The Water Right Determination and Administration Act of 1969 created seven water divisions based upon the largest ***river*** basins. Id. Each basin has its own water judge, appointed by the ***Colorado*** Supreme Court. Id. The water judges are district judges that have jurisdiction in the determination of water rights, the use and administration of water, and all other water matters within the water division. Id. Water lawsuits are initially adjudicated in the water court of the district in which the conflict arose. Id. Appeals then go directly to the ***Colorado*** Supreme Court. Id. [↑](#footnote-ref-31)
31. 31 [*St. Jude's* ***Co****., 351 P.3d at 446.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-32)
32. 32 Id. [↑](#footnote-ref-33)
33. 33 Id. [↑](#footnote-ref-34)
34. 34 Id. [↑](#footnote-ref-35)
35. 35 Id. [↑](#footnote-ref-36)
36. 36 Id. [↑](#footnote-ref-37)
37. 37 A headgate is the structure though which someone can control the amount of water that is diverted out of the stream. See Waskom & Neibauer, supra note 24. [↑](#footnote-ref-38)
38. 38 Id. [↑](#footnote-ref-39)
39. 39 [*St. Jude's* ***Co****., 351 P.3d at 446.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-40)
40. 40 Id. [↑](#footnote-ref-41)
41. 41 Id. [↑](#footnote-ref-42)
42. 42 Id. [↑](#footnote-ref-43)
43. 43 ***Colorado*** Supreme Court, ***Colo.*** Jud. Branch, [*https://www.courts.state.****co****.us/Courts/Supreme\_Court/Index.cfm*](https://www.courts.state.co.us/Courts/Supreme_Court/Index.cfm) (last visited Nov. 12, 2015) [[*https://perma.cc/F9GL-8W32*](https://perma.cc/F9GL-8W32)] (explaining that the ***Colorado*** Supreme Court has direct appellate jurisdiction over cases involving the adjudication of water rights). [↑](#footnote-ref-44)
44. 44 [*St. Jude's* ***Co****., 351 P.3d at 447-48.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-45)
45. 45 [*Id. at 445.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-46)
46. 46 See [*id. at 446.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-47)
47. 47 [*Id. at 445.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-48)
48. 48 Id. [↑](#footnote-ref-49)
49. 49 The majority's 5-2 decision was written by Justice Coats, with Justice Hood joining Justice Marquez's dissent. [*Id. at 442.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) Interestingly, Justice Hobbs, long considered the court's water expert, did not author an opinion. [↑](#footnote-ref-50)
50. 50 [*Id. at 457.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-51)
51. 51 [*Id. at 451*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("The Club's asserted aesthetic, recreation, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act.") (emphasis added). [↑](#footnote-ref-52)
52. 52 Id. [↑](#footnote-ref-53)
53. 53 [*406 P.2d 798 (1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-54)
54. 54 [*Id. at 800.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-55)
55. 55 [*St. Jude's* ***Co****., 351 P.3d at 448.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-56)
56. 56 [*406 P.2d at 800;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) See also Cliffton & Zilis, supra note 5, at 988 (noting that in Rocky Mountain Power ***Co***., the ***Colorado*** Supreme Court denied the appropriation "because it did not involve an actual diversion of water from the stream"). [↑](#footnote-ref-57)
57. 57 [*Rocky Mountain Power* ***Co****., 406 P.2d at 800*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) ("There is no support in the law of this state for the proposition that a minimum flow of water may be "appropriated' in a natural stream for piscatorial purposes without diversion of the water "appropriated' from the natural course of the stream."). [↑](#footnote-ref-58)
58. 58 ***Colo.*** Const. art. XVI, § 6. [↑](#footnote-ref-59)
59. 59 [*Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 n.9 (****Colo.*** *1999).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) [↑](#footnote-ref-60)
60. 60 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). [↑](#footnote-ref-61)
61. 61 Id. § 37-92-103(4)(a). [↑](#footnote-ref-62)
62. 62 Id. § 37-92-103(4)(b); see also infra section I.D.2. [↑](#footnote-ref-63)
63. 63 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [↑](#footnote-ref-64)
64. 64 [*St. Jude's* ***Co****. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 450 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-65)
65. 65 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831). [↑](#footnote-ref-66)
66. 66 [*Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n, 758 P.2d 164, 173 (****Colo.*** *1988).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0YD0-003D-94R3-00000-00&context=1516831) In that case, the plaintiffs wanted to fill in mining pits to create lakes that would be used for "recreation, including fishing areas and additional wildlife habitat." Id. The court held that the use was clearly within the statutory definition of beneficial use. Id. [↑](#footnote-ref-67)
67. 67 [*St. Jude's* ***Co****., 351 P.3d at 457*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (Marquez, J., dissenting in part and concurring in part). [↑](#footnote-ref-68)
68. 68 Id. (citing [*Upper Yampa Water Conservancy Dist. v. Wolfe, 255 P.3d 1108, 1111 (****Colo.*** *2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82K4-T7G1-652G-H002-00000-00&context=1516831) (affirming the water court's decision that an applicant must "show actual storage and actual beneficial use of a specific amount of water" (emphasis in original))). [↑](#footnote-ref-69)
69. 69 [*St. Jude's* ***Co****., 351 P.3d at 457-58*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (Marquez, J., dissenting in part and concurring in part). [↑](#footnote-ref-70)
70. 70 See id. [↑](#footnote-ref-71)
71. 71 [***Colo.*** *Rev. Stat. § 37-92-103(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016). [↑](#footnote-ref-72)
72. 72 [*830 P.2d 915, 919-20 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-73)
73. 73 [*28 P.2d 248, 250-51 (****Colo.*** *1933).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-YC40-0040-02RD-00000-00&context=1516831) [↑](#footnote-ref-74)
74. 74 The majority took issue with how to quantify the results of a piscatorial use. See infra section I.D.5. [↑](#footnote-ref-75)
75. 75 See [*Faden, 28 P.2d at 248-49.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-YC40-0040-02RD-00000-00&context=1516831) [↑](#footnote-ref-76)
76. 76 [*Fort Collins, 830 P.2d at 930-31.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-77)
77. 77 [*Id. at 931.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-78)
78. 78 [*Id. at 919-20.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) The diversion actually returned water to the Poudre ***River***'s "original" channel. [*Id. at 920.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) The ***river*** had carved a new channel as the result of severe flooding several years prior. Id. The important distinction was that this was a diversion for "recreational, piscatorial, fishery, and wildlife purposes." [*Id. at 930-31.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-79)
79. 79 [*Id. at 930*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-80)
80. 80 See [***Colo.*** *Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585, 599 (****Colo.*** *2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) (internal citation omitted) (stating that the RICD statute "was enacted, at least in part, in response to fears that under Fort Collins, appropriators could obtain high recreational in-channel flows, severely hindering ***Colorado***'s future development by either exporting or just tying up large amounts of water"). [↑](#footnote-ref-81)
81. 81 [*St. Jude's* ***Co****. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 450 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-82)
82. 82 Id. (citing Use, Webster's Third New International Dictionary (2002)). [↑](#footnote-ref-83)
83. 83 [*Id. at 450-51.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-84)
84. 84 ***Colo.*** Const. art. XVI, § 6; [*St. Jude's* ***Co****., 351 P.3d at 458*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (Marquez, J., dissenting in part and concurring in part). [↑](#footnote-ref-85)
85. 85 [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016) ("Beneficial use means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." (internal quotation marks omitted)). [↑](#footnote-ref-86)
86. 86 If we were only to look at whether or not the water was "used," then someone just diverting the water and wasting it would qualify. However, it is now clear that diversion is only a minor requirement, and that whether or not the use is beneficial actually makes a difference. See [*Archuleta v. Gomez, 200 P.3d 333, 343 (****Colo.*** *2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VK8-S4S0-TXFN-N3BG-00000-00&context=1516831) ("Diversion of water by itself cannot ripen into a water right if the water is not beneficially used."). [↑](#footnote-ref-87)
87. 87 [*St. Jude's* ***Co****., 351 P.3d at 450.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-88)
88. 88 See supra section I.D.3. [↑](#footnote-ref-89)
89. 89 [*St. Jude's* ***Co****., 351 P.3d at 450-51.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-90)
90. 90 Throughout the history of water cases in ***Colorado***, almost all of the uses could be defined as "active." See, e.g., [*Vance v. Wolfe, 205 P.3d 1165, 1169 (****Colo.*** *2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VM5-7FF1-2R6J-232N-00000-00&context=1516831) ("Even the most innovative beneficial uses … involve … active use."). [↑](#footnote-ref-91)
91. 91 See supra section I.D.6. [↑](#footnote-ref-92)
92. 92 See [*St. Jude's* ***Co****., 351 P.3d at 450;*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [*Coffin v. Left Hand Ditch* ***Co****., 6* ***Colo.*** *443, 447 (****Colo.*** *1882)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) ("The first appropriator of water from a natural stream for a beneficial purpose has … a prior right … ." (emphasis added)); [*Santa Fe Trail Ranches Prop. Owners Ass'n. v. Simpson, 990 P.2d 46, 52 (****Colo.*** *1882)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y27-KN70-0039-40TN-00000-00&context=1516831) ("Beneficial use defines the genesis and maturation of every appropriative water right in this state."). [↑](#footnote-ref-93)
93. 93 [*St. Jude's* ***Co****., 351 P.3d at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (citation omitted). [↑](#footnote-ref-94)
94. 94 Id. [↑](#footnote-ref-95)
95. 95 Id. (citing [*Vance v. Wolfe, 205 P.3d at 1168*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VM5-7FF1-2R6J-232N-00000-00&context=1516831) ("The extraction of water for the purpose of CBM is a beneficial use … .")). Coalbed methane natural gas (CBM) is naturally absorbed on the internal surface of coal and held in place by the pressure from groundwater. [*Vance, 205 P.3d at 1167.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VM5-7FF1-2R6J-232N-00000-00&context=1516831) That pressure is relieved by drilling wells and removing the groundwater; the CBM then desorbs from the coal and is collected. Id. The removed water is collected on the surface and stored in tanks. Id. Later, that water is reinjected back into the ground. Id. More than 4,000 wells have been drilled into the deep coalbeds of the San Juan Basin in southern ***Colorado***. Id. [↑](#footnote-ref-96)
96. 96 Id. If the water used in CBM production was not considered a beneficial use, then the drilling companies did not have to apply for a water right. Id. This was important because if the drilling companies had to appropriate a water right, it would be a far junior right, especially as compared to the ranchers'. Id. Once the use was declared to be beneficial, the use of water in CBM production is now "subject to administration and permitting" by the State and Division Water Engineers, and the 1969 Act. Id. With that authority, the drilling companies are now no longer able to call for "out-of-priority diversions for CBM production with a well permit and, where necessary, a decree adjudicating an augmentation plan." Id. [↑](#footnote-ref-97)
97. 97 Id. [↑](#footnote-ref-98)
98. 98 [*St. Jude's* ***Co****., 351 P.3d at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (citing [*Vance, 205 P.3d at 1169)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VM5-7FF1-2R6J-232N-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-99)
99. 99 See [*Vance, 205 P.3d at 1169.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7VM5-7FF1-2R6J-232N-00000-00&context=1516831) [↑](#footnote-ref-100)
100. 100 See generally [*St. Jude's* ***Co****., 351 P.3d at 458*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (Marquez, J., dissenting in part and concurring in part). [↑](#footnote-ref-101)
101. 101 [*Id. at 451*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (majority opinion). [↑](#footnote-ref-102)
102. 102 Id. [↑](#footnote-ref-103)
103. 103 Id. [↑](#footnote-ref-104)
104. 104 Given the relative lack of water in ***Colorado***, the court is rightly concerned with ensuring that water is not wasted, and that the use is as efficient as possible. See [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2016); [*St. Jude's* ***Co****., 351 P.3d at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("The Act's emphasis on reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful."); see also ***Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 635 (Colo. 1954)*** (stating that an appropriation "should be denied only in such instances as where it is impossible to impose reasonable" limits on the use). With that in mind, the court prefers objective standards with hard numbers, rather than "soft" standards that are merely experts' opinions. However, the RICD statute is a perfect example of how hard numbers in the hands of an expert can be used to come up with reasonable amount of water usage. See [***Colo.*** *Rev. Stat. § 37-92-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (defining beneficial use as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."). A similar line of reasoning could be used here to turn quantifiable amounts of streamflow into a "reasonable recreational experience." [↑](#footnote-ref-105)
105. 105 [*St. Jude's* ***Co****., 351 P.3d at 451.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-106)
106. 106 Id. [↑](#footnote-ref-107)
107. 107 [***Colo.*** *Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585, 602-03 (****Colo.*** *2005).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) This case was one of the first to interpret ***Colorado***'s RICD statute. Id. [↑](#footnote-ref-108)
108. 108 [*Id. at 603.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) [↑](#footnote-ref-109)
109. 109 See Wilkinson, supra note 18, at 232-33 (showing that the development of prior appropriation law incentivized early users (often miners) to use all of the water in a stream). [↑](#footnote-ref-110)
110. 110 [*Upper Gunnison Water Conservancy Dist., 109 P.3d at 589*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FPS-DG40-0039-4177-00000-00&context=1516831) ("Any appropriation in excess of the minimum stream flow for a reasonable recreational experience in and on the water does not put water to beneficial use." (emphasis added)). [↑](#footnote-ref-111)
111. 111 [***Colo.*** *Rev. Stat. § 37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)-(6) (2016); ***Colo.*** Const. art. XVI, § 6 (requiring that the water be put to beneficial use, in conjunction with the ***Colorado*** Supreme Court's ruling that any excess appropriation is not a beneficial use). [↑](#footnote-ref-112)
112. 112 [***Colo.*** *Rev. Stat.§§37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)-(6), 37-92-103(4), (7), (10.3), 37-92-305 (13)-(16) (originally passed as S.B. 01-216, 63d Gen. Assemb., Reg. Sess. (***Colo.*** 2001)). [↑](#footnote-ref-113)
113. 113 Id. § 37-92-305(13)(b) (asking "whether the intended recreational experience is reasonable"). [↑](#footnote-ref-114)
114. 114 See, e.g., Brent Gardner-Smith, State Water Board Rules Against Glenwood's Proposed Whitewater Rights, Aspen Journalism (July 16, 2015), [*http://aspenjournalism.org/2015/07/16/state-water-board-rules-against-glenwoods-proposed-whitewater-rights/*](http://aspenjournalism.org/2015/07/16/state-water-board-rules-against-glenwoods-proposed-whitewater-rights/) [[*https://perma.cc/CNG3-EY3S*](https://perma.cc/CNG3-EY3S)] (discussing the CWCB's denial of the City of Glenwood Springs application for an RICD on the ***Colorado*** ***River***). The city's application for the water necessary to sustain three new whitewater parks was denied because the CWCB found that the RICD "would "impair ***Colorado***'s ability to fully develop its compact entitlements' and would not promote "the maximum beneficial use of water' in the state." Id. However, after the CWCB ruling, the case will now be heard in water court. Id. Multiple parties are supporting Glenwood Springs in that case, including Western Resource Advocates and American Whitewater. Id. Addressing the CWCB's concerns, Nathan Fey, the ***Colorado*** stewardship director for American Whitewater said, "it is unclear what evidence the staff presented that shows it is of material impairment to developing our water, or maximizing use of the state's water … . Those are significant concerns, but I don't think the state made a very strong case on those points." Id. [↑](#footnote-ref-115)
115. 115 [*St. Jude's* ***Co****. v. Roaring Fork, L.L.C., 351 P.3d 442, 460 (****Colo.*** *2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (Marquez, J., dissenting in part and concurring in part). [↑](#footnote-ref-116)
116. 116 Id. [↑](#footnote-ref-117)
117. 117 Id. [↑](#footnote-ref-118)
118. 118 See supra sections I.D.1-2. [↑](#footnote-ref-119)
119. 119 [*St. Jude's* ***Co****., 351 P.3d at 451*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("The Club's asserted aesthetic, recreational, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act. It is for the General Assembly to approve such unconventional beneficial uses."). [↑](#footnote-ref-120)
120. 120 With more than 1,600 ISFs and counting, there are simply too many for the CWCB to effectively monitor. In contrast, private parties usually have a small number of water rights - and their livelihood is tied to that right - so close monitoring is much more likely. See Instream Flow Program, ***Colo.*** Water Conservation Bd., ***Colo.*** Dep't. of Nat. Res., [*http://cwcb.state.****co****.us/*](http://cwcb.state.co.us/) environment/instream-flow-program/Pages/main.aspx (last visited Nov. 2, 2016) [[*https://perma.cc/R4CJ-SW79*](https://perma.cc/R4CJ-SW79)]. [↑](#footnote-ref-121)
121. 121 The "Upper Basin" states are Wyoming, ***Colorado***, Utah, and New Mexico. The Law of the ***River***, Bureau of Reclamation, U.S. Dept. of the Interior, [*http://www.usbr.gov/lc/region/g1000/lawofrvr.html*](http://www.usbr.gov/lc/region/g1000/lawofrvr.html) (last updated Mar. 2008) [[*https://perma.cc/5J78-WL6U*](https://perma.cc/5J78-WL6U)]. Conversely, the "Lower Basin" states are Arizona, Nevada, and California. Id. [↑](#footnote-ref-122)
122. 122 An acre-foot is the amount of water necessary to cover an acre of land to a depth of one foot. Barton H. Thompson, Jr. et al., supra note 19, at 26-27. This is approximately 326,000 gallons of water, and in the U.S. it is accepted as the planned annual water usage of a suburban household. What's an Acre-foot?, Water Ed. Found., [*http://www.watereducation.org/general-information/whats-acre-foot*](http://www.watereducation.org/general-information/whats-acre-foot) (last visited Jan. 30, 2017) [[*https://perma.cc/7ZYD-BG68*](https://perma.cc/7ZYD-BG68)]. [↑](#footnote-ref-123)
123. 123 The ***Colorado*** ***River*** Compact was passed in 1922 to regulate how water from the ***Colorado*** ***River*** was distributed between the seven states that contain the ***Colorado*** itself or its tributaries. Charles J. Meyers, The ***Colorado*** ***River***, 19 Stan. L. Rev. 1, 16 (1966). The upper basin states were concerned that water development projects in the lower basin - including Hoover Dam - would deprive them of their ability to utilize the ***river***'s flows under prior appropriation. Id. Then Secretary of Commerce Herbert Hoover came up with the plan to divide the states into the upper and lower basin, with each basin having the right to develop and use 7.5 maf annually. Id. [↑](#footnote-ref-124)
124. 124 Jeffrey Jacobs, The Sustainability of Water Resources in the ***Colorado*** ***River*** Basin, Bridge, Winter 2011, at 6, 10. [↑](#footnote-ref-125)
125. 125 Meyers, supra note 123, at 31 n.119. [↑](#footnote-ref-126)
126. 126 Jacobs, supra note 124, at 10 ("Long-term ***Colorado*** ***River*** mean flow calculated over hundreds of years is significantly less than the 15 MAF/yr figure based on 20th century flows recorded at Lees Ferry."); Wilkinson, supra note 18, at 226 ("The upper basin states had been inadvertently snookered."). [↑](#footnote-ref-127)
127. 127 Wilkinson, supra note 18, at 226-27. [↑](#footnote-ref-128)
128. 128 Nonconsumptive Needs (Environmental and Recreational), ***Colo.*** Water Conservation Bd., ***Colo.*** Dep't. of Nat. Res., [*http://cwcb.state.****co****.us/*](http://cwcb.state.co.us/) environment/non-consumptive-needs/Pages/main.aspx (last visited Nov. 2, 2016) [[*https://perma.cc/72HW-RKV5*](https://perma.cc/72HW-RKV5)]. [↑](#footnote-ref-129)
129. 129 See Thompson, Jr., et al., supra note 19, at 171. [↑](#footnote-ref-130)
130. 130 See Jason Anthony Robison, The ***Colorado*** ***River*** Revisited, 88 U. ***Colo.*** L. Rev. (2017) (forthcoming). [↑](#footnote-ref-131)
131. 131 Full appropriation of a ***river*** does not necessarily mean that the stream is dewatered. This is a very important distinction. Full appropriation means that the entire flow of the ***river*** is appropriated, while dewatering is the literal running dry of the stream. Because of return flows (water that is used and then runs back into the stream) and the order of priority (seniors are often much further downstream than juniors), fully appropriated streams are rarely dewatered. [↑](#footnote-ref-132)
132. 132 Sarah Tory, ***Colorado*** ***River***'s Economy Worth $ 9 Billion, High Country News (Oct. 2, 2014), [*http://www.hcn.org/articles/colorados-****river****-economy-worth-9-billion*](http://www.hcn.org/articles/colorados-river-economy-worth-9-billion) [[*https://perma.cc/WHF3-CQAA*](https://perma.cc/WHF3-CQAA)]. [↑](#footnote-ref-133)
133. 133 Id. [↑](#footnote-ref-134)
134. 134 Jason Blevins, ***Colorado*** Emerging as a National Leader in Developing a Recreation-Based Economy, Denver Post (June 5, 2016), [*http://www.denverpost.com/2016/06/05/after-languishing-at-the-political-kids-table-outdoor-recreation-emerges-as-a-key-driver-of-the-u-s-economy/*](http://www.denverpost.com/2016/06/05/after-languishing-at-the-political-kids-table-outdoor-recreation-emerges-as-a-key-driver-of-the-u-s-economy/) [[*https://perma.cc/9YXY-GR97*](https://perma.cc/9YXY-GR97)] ("Soaring numbers of visitors are swelling public and private coffers."). See, e.g., About, North Park Anglers Fly Fishing Club, [*www.coloradoflyfishingclub.com/about/*](http://www.coloradoflyfishingclub.com/about/) (last visited Nov. 3, 2016) [[*https://perma.cc/4FBX-S3QF*](https://perma.cc/4FBX-S3QF)]. [↑](#footnote-ref-135)
135. 135 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-136)
136. 136 ***Colo.*** Water Conservation Bd., supra note 120. [↑](#footnote-ref-137)
137. 137 George Sibley, Right to Remain: Non-consumptive Water Rights Pose a Worthwhile Administrative Challenge, ***Colo.*** Found. for Water Educ. (2009), [*https://www.yourwatercolorado.org/headwaters-archive-template/78-headwaters-magazine/headwaters-summer-2009/128-right-to-remain-non-consumptive-water-rights-pose-a-worthwhile-administrative-challenge*](https://www.yourwatercolorado.org/headwaters-archive-template/78-headwaters-magazine/headwaters-summer-2009/128-right-to-remain-non-consumptive-water-rights-pose-a-worthwhile-administrative-challenge) [[*https://perma.cc/C96G-ZQXV*](https://perma.cc/C96G-ZQXV)]. [↑](#footnote-ref-138)
138. 138 Id. ("One problem is an inadequate number of stream measuring gauges."); Jack Sterne, Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest, [*27 Envtl. L. 203, 217 (1997)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-2M90-00CW-B24H-00000-00&context=1516831) ("Agencies may not have the staff, the time, or the inclination to monitor instream rights and complain whenever they are violated."). [↑](#footnote-ref-139)
139. 139 AMEC & Hydros Consulting, Yampa/White/Green Basin Implementation Plan, at E-2 to -3 (2015), [*https://www.****colorado****.gov/pacific/sites/*](https://www.colorado.gov/pacific/sites/) default/files/Yampa-WhiteBIP\_Full.pdf [[*https://perma.cc/R8CJ-RMT7*](https://perma.cc/R8CJ-RMT7)]. [↑](#footnote-ref-140)
140. 140 Id. [↑](#footnote-ref-141)
141. 141 ***Colorado*** Historical Snowpack Percentages by Watershed, Nat. Res. Conservation Serv. ***Colo.***, U.S. Dep't Agric., [*http://www.nrcs.usda.gov/wps/*](http://www.nrcs.usda.gov/wps/) portal/nrcs/detail/***co***/snow/products/?cid=nrcs144p2\_063325 [[*https://perma.cc/*](https://perma.cc/) G9WD-3ABZ]. [↑](#footnote-ref-142)
142. 142 Monitoring and Enforcement, ***Colo.*** Water Conservation Bd., ***Colo.*** Dep't Nat. Res., [*http://cwcb.state.****co****.us/environment/instream-flow-program/*](http://cwcb.state.co.us/environment/instream-flow-program/) Pages/MonitoringEnforcement.aspx [[*https://perma.cc/4YLH-S29E*](https://perma.cc/4YLH-S29E)]. [↑](#footnote-ref-143)
143. 143 CWCB staff actively monitors ISFs at only 70 stream gauges. See id. [↑](#footnote-ref-144)
144. 144 See Sterne, supra note 138, at 217-19. [↑](#footnote-ref-145)
145. 145 See 2016 Proposed Instream Flow and Natural Lake Level Appropriations, ***Colo.*** Water Conservation Bd., ***Colo.*** Dep't Nat. Res., [*http://cwcb.state.****co****.us/*](http://cwcb.state.co.us/) technical-resources/instream-flow-water-rights-database/pages/main.aspx (last updated Feb. 1, 2016) [[*https://perma.cc/4FZP-QK6R*](https://perma.cc/4FZP-QK6R)]. [↑](#footnote-ref-146)
146. 146 Sibley, supra note 137 ("Water today is at least as valuable economically in the ***river*** as it is out of it."). [↑](#footnote-ref-147)
147. 147 ***Colo.*** Water Conservation Bd., supra note 120. [↑](#footnote-ref-148)
148. 148 Dan Merriman & Anne M. Janicki, ***Colorado***'s Instream Flow Program - How it Works and Why It's Good for ***Colorado*** 5 (2005), [*http://cwcb.state.****co****.us/environment/instream-flow-program/documents/whyisfpro*](http://cwcb.state.co.us/environment/instream-flow-program/documents/whyisfpro) gramworksgoodforcopdf.pdf [[*https://perma.cc/DL9J-TK7C*](https://perma.cc/DL9J-TK7C)]. [↑](#footnote-ref-149)
149. 149 Most water rights ensure a specific amount of a water at a certain point (e.g., the owner's headgate). Id. [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 [***Colo.*** *Rev. Stat. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2016). [↑](#footnote-ref-152)
152. 152 See Sterne, supra note 138, at 218. [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 [*St. Jude's* ***Co****. v. Roaring Fork, L.L.C., 351 P.3d 442, 451 (****Colo.*** *2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("Without describing a purpose for the accomplishment of which a measureable amount of water, however approximate, must be used, the Club, by definition, fails to articulate an intent to put the specific amount of water it claims to a beneficial use." ). [↑](#footnote-ref-155)
155. 155 [*Id. at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("There is not, and clearly could not be, any suggestion that the Club's practice in this regard is one of the three applications specifically authorized as beneficial uses."). However, as discussed above, supra section I.D.1, the statute clearly does not limit beneficial uses to the three specifically mentioned in C.R S. section 37-92-103(4). [↑](#footnote-ref-156)
156. 156 See supra, section II.B.1. [↑](#footnote-ref-157)
157. 157 [*St. Jude's* ***Co****., 351 P.3d at 449*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("This definition echoes the terminological usage of the constitution, by implicitly distinguishing a "purpose,' as the end for which the water is used; a "use,' as an application of water toward a given purpose and the means to that end; and a "beneficial use,' as that use which is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is made.") (quoting [***Colo.*** *Rev. Stat. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831)). [↑](#footnote-ref-158)
158. 158 Id. [↑](#footnote-ref-159)
159. 159 [*Id. at 451.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-160)
160. 160 Id. [↑](#footnote-ref-161)
161. 161 [*Id. at 450*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) ("The Act's emphasis on reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful."). [↑](#footnote-ref-162)
162. 162 [***Colo.*** *Rev. Stat. § 37-92-102(6)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831). [↑](#footnote-ref-163)
163. 163 See [*St. Jude's* ***Co****., 351 P.3d at 450-51.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-164)
164. 164 See supra section I.A.1. [↑](#footnote-ref-165)
165. 165 See supra section II.B.1. [↑](#footnote-ref-166)
166. 166 See generally [***Colo.*** *Rev. Stat. § 37-92-503*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3GM-00000-00&context=1516831) (listing the specific circumstances under which a water right is forfeited in ***Colorado***). A change in the definition of beneficial use is not on that highly restrictive list. [↑](#footnote-ref-167)
167. 167 FishingRanches.com, [*http://www.fishingranches.com*](http://www.fishingranches.com) (last visited Apr. 2016) [[*https://perma.cc/TX3K-WFFB*](https://perma.cc/TX3K-WFFB)]. [↑](#footnote-ref-168)
168. 168 Jason Blevins, ***Colorado*** Tourism Numbers Set Record in 2014, Denver Post: Business (June 23, 2015), [*http://www.denverpost.com/2015/06/23/****colorado****-tourism-numbers-set-record-in-2014/*](http://www.denverpost.com/2015/06/23/colorado-tourism-numbers-set-record-in-2014/) (last updated Apr. 24, 2016) [[*https://perma.cc/SDM5-2LFV*](https://perma.cc/SDM5-2LFV)] ("A record 71.3 million visitors spent $ 18.6 billion in ***Colorado*** in 2014."). [↑](#footnote-ref-169)
169. 169 [*St. Jude's* ***Co****. v. Roaring Fork, L.L.C., 351 P.3d 442, 451 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-170)
170. 170 Id. [↑](#footnote-ref-171)
171. 171 See [*In re Bd. Of Cty. Comm'rs of Arapahoe v. United States, 891 P.2d 952, 972 (****Colo.*** *1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) ("We have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the ***Colorado*** Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs."). [↑](#footnote-ref-172)
172. 172 [*St. Jude's* ***Co****., 351 P.3d at 451*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) (citing [*People v. Emmert, 597 P.2d 1025, 1029 (****Colo.*** *1979)).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1DW0-003D-926G-00000-00&context=1516831) [↑](#footnote-ref-173)
173. 173 [***Colo.*** *Rev. Stat. § 37-92-102(6)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831). [↑](#footnote-ref-174)
174. 174 Id. [↑](#footnote-ref-175)
175. 175 See Pauline Adams, Christopher James & Clay Speas, Brown Trout (Salmo trutta) Species and Conservation Assessment Prepared for the Grand Mesa, Uncompahgre, and Gunnison National Forests (2008), [*http://www.fs.usda.gov/Internet/FSE\_DOCUMENTS/stelprdb5199817.pdf*](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5199817.pdf) [[*https://perma.cc/4GR9-A6GS*](https://perma.cc/4GR9-A6GS)] (describing the various habitat requirements - including stream gradient, water temperature, and pool depth for spawning - for brown trout). [↑](#footnote-ref-176)
176. 176 ***Colorado*** Stream Flow Guide with ***Colorado*** ***River*** Flow and ***Colorado*** ***River*** Level, allaboutrivers.com, [*http://stream-flow.allaboutrivers.com/*](http://stream-flow.allaboutrivers.com/) ***Colorado***/***river***\_flow-sCO.html (last visited Mar. 2016) [[*https://perma.cc/VMR9-9HDP*](https://perma.cc/VMR9-9HDP)]. [↑](#footnote-ref-177)
177. 177 [*St. Jude's* ***Co****. v. Roaring Fork, L.L.C., 351 P.3d 442, 450 (****Colo.*** *2015).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-178)
178. 178 See supra section I.D.4. [↑](#footnote-ref-179)
179. 179 [*St. Jude's* ***Co****., 351 P.3d at 451.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB3-MR41-F04C-301X-00000-00&context=1516831) [↑](#footnote-ref-180)
180. 180 ***Colo.*** Const. art. XVI, § 5 ("The water of every natural stream … is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state."). [↑](#footnote-ref-181)
181. 181 Id. § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). [↑](#footnote-ref-182)
182. 182 [***Colo.*** *Rev. Stat. § 37-92-102(6)(b)(V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831). [↑](#footnote-ref-183)
183. 183 But see Lawrence Myers, Comment, To Have Our Water and Use it Too: Why ***Colorado*** Water Law Needs a Public Interest Standard, [*87 U.* ***Colo.*** *L. Rev. 1041 (2016)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5JX0-MTV0-00CV-N1DC-00000-00&context=1516831) (showing that the reservation of instream flows doesn't limit economic development, but rather promotes it). [↑](#footnote-ref-184)
184. 184 See supra section I.D.2. [↑](#footnote-ref-185)
185. 185 See supra Part III. [↑](#footnote-ref-186)