

# [***SYMPOSIUM: STATUTORY EXPANSION OF STATE AGENCIES' AUTHORITY TO ADMINISTER AND DEVELOP WATER RESOURCES IN RESPONSE TO COLORADO'S DROUGHT***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4C46-DK00-00SW-5004-00000-00&context=1516831)

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**Author:** MELINDA KASSEN+

+ Melinda Kassen is the director of the ***Colorado*** Water Project for Trout Unlimited. She expresses her deep gratitude to A. Lain Strawn, University of ***Colorado*** JD 2004, for her invaluable assistance and enthusiasm in researching and helping prepare this article.

**Text**

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

***Colorado*** is a semi-arid state. On average, fewer than fifteen inches of precipitation falls in an average year [[1]](#footnote-2)1 and less in drought years. In 2002, ***Colorado*** experienced its most severe single-year drought on record. [[2]](#footnote-3)2 Stream flows statewide were the lowest in over 100 years, and tree ring data suggest flows were probably the lowest in 300 to 500 years. [[3]](#footnote-4)3 In response to these conditions, ***Colorado*** lawmakers considered forty-three water bills and resolutions - many aimed at drought relief. [[4]](#footnote-5)4 This article considers one of the consequences of six water-related bills the legislature actually enacted: an increase in state agencies' authority over water rights administration and development. [[5]](#footnote-6)5 It is unlikely the General Assembly **[\*49]** would have enacted so many bills related to water rights administration and water development had the drought not been so severe.

Four of the General Assembly's 2003 resolutions reflect the magnitude of the drought, the political pressure the drought created, and the reasons the legislature took such dramatic steps. Through these resolutions, the legislature called on citizens, municipalities, the state government, and even Congress to help address the crisis the drought created.

Even a cursory review of the resolutions highlights the legislature's concerns. Calling for a reduction in the amount of water used for landscaping, the General Assembly recognized that "water demands imposed by traditional landscaping … result in an unreasonable and unnecessary burden on future water resources." [[6]](#footnote-7)6 The General Assembly also adopted a resolution endorsing ten principles designed to guide State water policy making, particularly regarding transbasin diversions. [[7]](#footnote-8)7 In calling upon Congress to adopt federal legislation to **[\*50]** control tamarisk - an invasive phreatophyte species that consumes large quantities of water in the riparian systems where it grows - the General Assembly reminded its audience that "water consumption in ***Colorado*** due to the tamarisk … may exceed 250,000 acre-feet per year; and … ***Colorado*** is currently experiencing the worst drought in modern history." [[8]](#footnote-9)8 Finally, the General Assembly supported the Secretary of Interior's decision to enforce the Interim Surplus Guidelines under the ***Colorado*** ***River*** Compact, and prohibit California from taking more than its 4.4 million acre-feet allocation of ***Colorado*** ***River*** water. [[9]](#footnote-10)9 Again, the General Assembly recognized that "the past 4 years of drought, culminating in the record-setting parched conditions of 2002, have touched every region of the State of ***Colorado***; water shortages … have reached crisis proportions." [[10]](#footnote-11)10 Certainly, drought was much on the minds of ***Colorado*** legislators.

These resolutions, however, did not alter ***Colorado***'s system of water rights administration and development. Even with these recommendations, legislators faced another burden: ***Colorado***'s court-based water allocation system can be inadequate for responding to severe drought conditions in a timely manner. [[11]](#footnote-12)11 Lawmakers realized they needed to increase the flexibility and speed of the system for more effective drought response. [[12]](#footnote-13)12 Therefore, to solve both short and long-term problems caused by ***Colorado***'s drought cycles, state legislators set out to integrate increased flexibility and speed into water rights administration and development. [[13]](#footnote-14)13

The legislature's response is remarkable because increasing state agency authority over water rights administration and development runs counter to ***Colorado***'s traditional hands-off approach in managing water resources. Since the late nineteenth century, ***Colorado*** has maintained a court-based system for water rights determination. [[14]](#footnote-15)14 The 2003 legislation attempts to streamline processes to increase the overall efficiency of water rights administration, but also gives a state agency the power to make determinations in matters **[\*51]** previously reserved to the courts. [[15]](#footnote-16)15 Similarly, the State has played a limited role in water development because so many other entities have had the power and responsibility to provide water to those entitled to its use. The federal government, private interests, quasi-governmental entities like water districts, and municipalities have facilitated water project planning, financing, and development. [[16]](#footnote-17)16 The output of the 2003 legislative session, however, suggests that the legislature is interested in seeing the executive branch take on a much more active role in ***Colorado***'s water development. [[17]](#footnote-18)17

This article examines the legislature's actions relating to both water rights administration and water development. Part II considers water rights administration in ***Colorado***, provides an overview of the state engineer's traditional role, discusses the suite of 2003 legislative enactments that increase the state engineer's powers, and outlines the possible implications of these changes for the future of water administration in ***Colorado***. Part III considers the State's changing role in water development. This section first examines existing entities - federal and local - that have played a role in water development in ***Colorado***. This section then compares and contrasts the historic role of both the ***Colorado*** Water Conservation Board ("CWCB") and the ***Colorado*** Water and Power Development Authority ("the Authority") with the expanded role these agencies will play in future water development projects. Finally, this section analyzes whether the recent legislation represents an incremental change in state agency authority in response to the drought or a more significant shift in the balances of power for water development.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). LEGISLATURE EXPANDS AUTHORITY OF STATE ENGINEER

***Colorado***, alone among states using the prior appropriation system to allocate rights to use water, relies exclusively on a court-based system of determining these water rights. During the 2003 legislative session, however, the state engineer received new authorities that go beyond the traditional administrative role and allow agency determinations of injury to others holding water rights.

A. The Historical Balance of Power Between ***Colorado***'s Water Courts and State Engineer

The State included the prior appropriation doctrine for water allocation into its Constitution in 1876. [[18]](#footnote-19)18 Developed in the California mining camps of the 1850s, the doctrine recognizes water rights in **[\*52]** priority ("first in time, first in right") for diversions of water from the natural system to beneficial use elsewhere, so long as the water continues to be used [[19]](#footnote-20)19 ("use it or lose it"). Six years later, the ***Colorado*** Supreme Court, in Coffin v. Left Hand Ditch Company, affirmed prior appropriation as the state's system for allocating water rights. [[20]](#footnote-21)20 In Coffin, the court explained that diverted waters "acquire[] a value unknown in moister climates. Instead of being a mere incident to the soil, [water] rises, when appropriated, to the dignity of a distinct … right of property." [[21]](#footnote-22)21 As a result, water users have a property right to use water protected through a complex court-based scheme of water rights determinations. [[22]](#footnote-23)22 Thus, notwithstanding a companion constitutional declaration that ***Colorado***'s water is a public resource, water users themselves, individually and in groups, effectively developed both their water rights and a legal system for the protection of water rights in a manner that did not consider the public interest. [[23]](#footnote-24)23

Traditionally, water users have viewed state governmental interference with the appropriation of ***Colorado***'s water resources, other than for purposes of administration, as "completely inconsistent with the constitutionally mandated doctrine of prior appropriation." [[24]](#footnote-25)24 While a state official, the state engineer, has administered water rights virtually since statehood, [[25]](#footnote-26)25 the state engineer's role has not significantly changed over time. In 1969, the ***Colorado*** General Assembly revamped how the State would implement the prior appropriation system, and clarified the state engineer's authority over administration of water resources. [[26]](#footnote-27)26 Since the 1969 Act, there have been only relatively modest changes to the state engineer's authority. [[27]](#footnote-28)27 However, **[\*53]** the current drought appears to have motivated lawmakers to delegate increased authority to the state engineer, thereby increasing the overall flexibility of ***Colorado***'s water rights system.

In order to understand the changes made to the role of the state engineer in 2003, however, an overview of the traditional means of administering and determining water rights through water courts and the state engineer, and the relationship between them, is instructive.

1. Water Courts

In ***Colorado***, the legislature has given the judiciary the job of adjudicating water rights. [[28]](#footnote-29)28 In so doing, the General Assembly intended to optimize the efficiency of water allocation and ensure the certainty of water rights. Since the courts identify decreed rights with specificity as to their amount and priority, and establish a means of protecting the vested rights of water users from injury by others, the State can ensure "maximum" utilization of its scarce resource and water users can operate with certainty that they will be able to use water at specific times subject only to the seniority of their water right. [[29]](#footnote-30)29

One of the long-standing tasks delegated to the water courts is determining whether material injury to an existing right is likely to result from a proposed application for a new water right, a change to an existing water right, an augmentation plan, or an exchange. [[30]](#footnote-31)30 Injury exists if a senior water right holder proves, with evidence demonstrating more than potential injury, that the new right will materially affect a senior user's ability to use its decreed water. [[31]](#footnote-32)31 Although an applicant may offer conditions designed to prevent injury, the water judge ultimately determines whether an application, with appropriate conditions, will cause material injury to senior water rights. [[32]](#footnote-33)32 Even after the court issues a decree, a party potentially injured may return to argue injury anew. To allow for consideration of unforeseen injuries, the water court retains jurisdiction over a case to re-visit the material injury question after the applicant actually uses the new or changed right. [[33]](#footnote-34)33

**[\*54]** The process of obtaining a water court decree can take months, if not years. One court official estimated that on average, it takes at least six months and as many as two years before the court issues a decree for an unopposed application. [[34]](#footnote-35)34 Contested cases often take even longer. Because of the complexity of even "typical" water rights adjudications, the discovery and disclosure periods are highly variable and can last for months. Moreover, while the statutes governing water rights determination do impose certain deadlines within the process, other steps have no time limitations. [[35]](#footnote-36)35

2. The State Engineer

The role of the state engineer remained relatively constant from 1889 to 1963. [[36]](#footnote-37)36 The state engineer enforced the court's water rights decrees and performed a few tasks collateral to water rights administration, such as approving designs for reservoir safety [[37]](#footnote-38)37 and metering temporary exchanges between water users. [[38]](#footnote-39)38 As technological advancements of the 1950s and 1960s enabled well drilling into ***Colorado***'s alluvial aquifers, the legislature expanded the state engineer's administrative duties to include the administration of both surface and tributary ground water diversions. [[39]](#footnote-40)39

**[\*55]** When the General Assembly revamped ***Colorado***'s existing water rights administration system in 1969, it codified many of the state engineer's expanded responsibilities and reorganized his office. [[40]](#footnote-41)40 Still, the 1969 Act did not expand the role of the state engineer beyond administration. For example, the state engineer grants well permits but does not determine the water right for the well. [[41]](#footnote-42)41 The state engineer tabulates all of the water rights and their relative priorities, and once a decade proposes to the water court a list of potentially abandoned water rights, but the water court ultimately approves the abandonment list and tabulations. [[42]](#footnote-43)42 While the state engineer enjoys the authority to promulgate regulations for integrating well and surface diversions, if the regulations are contested (which invariably happens), the water court determines their validity. [[43]](#footnote-44)43

B. General Assembly Grants State Engineer Authority to Make Determinations of Material Injury and Approve Transactions

Several events caused the recent deluge of water legislation. The 2002 drought, the likelihood of future drought cycles, and ***Colorado***'s population explosion - which has placed increased pressure on the state's limited water resources - together created a need for a political, and therefore legislative, response to ***Colorado***'s water supply problems. Moreover, the drought highlighted the water courts' inability to respond quickly to water user needs during drought conditions. It is interesting to examine the water legislation passed in 2003 for the extent to which the new laws increased the state engineer's powers over water administration and determination of water rights. The drought was a catalyst for the ***Colorado*** General Assembly to move ***Colorado***'s system one step away from its traditional, "pure" court-based system of water resources determination towards a more flexible system in which state administrative agencies, rather than the courts, make determinations of water rights.

Specifically, House Bill 1318 creates water banks, which allow the state engineer to approve temporary water transfers without formal changes in ownership requiring adjudication. [[44]](#footnote-45)44 House Bill 1320 permits a water user to lend a diversionary water right to the CWCB to protect junior instream flow rights during a season in which the governor has declared a drought or other emergency pursuant to the approval of the state engineer. [[45]](#footnote-46)45 House Bill 1334 allows for interruptible water supply agreements - option contracts between two or more water rights holders that allow for the transfer of historic **[\*56]** consumptive use to a different use or place of use, again with the approval of the state engineer. [[46]](#footnote-47)46 Finally, Senate Bill 73 provides a limited bridge for water users along the South Platte to continue pumping their wells out-of-priority and House Bill 1001 expands the state engineer's authority to approve substitute supply plans ("SSPs") statewide. [[47]](#footnote-48)47

1. Water Banks

House Bill 1318 allows water banking throughout ***Colorado***. [[48]](#footnote-49)48 A water bank enables willing water owners to deposit water in the "bank" for lease to willing "lessees" on a short-term basis. [[49]](#footnote-50)49 A water bank gives those interested in fallowing their fields for a season the option of receiving rental payments for their water without otherwise changing or affecting the underlying water rights. [[50]](#footnote-51)50 Water banking adds flexibility to water administration by permitting temporary transfers without formal changes in ownership, thereby making water available quickly without protracted adjudication in water court. [[51]](#footnote-52)51 Whether the reason for desiring more flexibility stems from societal changes that require easier transactions or from a drought that requires quick mitigation, the same principles apply. [[52]](#footnote-53)52

While in theory either a governmental or a private entity can administer a water bank, [[53]](#footnote-54)53 ***Colorado***'s General Assembly vested this power with the state engineer, who may delegate his operational authority to another entity. [[54]](#footnote-55)54 The statutory structure also suggests that if the State in fact creates banks, local water districts will operate the banks. [[55]](#footnote-56)55 Although the bank operators will be responsible for facilitating leasing and transactional requirements (including storage, financial accounting, and ensuring the water bank's operations do not injure other water users), [[56]](#footnote-57)56 House Bill 1318 directs the state engineer to establish rules for bank operations that will effectively control and substantially limit the bankers' independent discretionary authority. [[57]](#footnote-58)57

The Northern Water Conservancy District ("Northern") has already had what, by all accounts, is a positive experience with water banking. Northern operates a bank for the water users within its system. Through the bank, Northern can transfer water anywhere within its boundaries at no charge and without water court **[\*57]** adjudication. [[58]](#footnote-59)58 There is no need to determine whether injury might occur because Northern owns all of the water rights involved. [[59]](#footnote-60)59 Water users with direct allotments of Northern's water, or water users who own shares in ditch companies with allotments of Northern's water, arrange a transaction between each other on a willing buyer/willing seller basis, transferring the water through Northern's facilities or their own ditches. [[60]](#footnote-61)60 In addition, the parties must notify Northern of finalized, proposed transactions via post card to the District. [[61]](#footnote-62)61 Although nowhere articulated, such transfers are limited to one irrigation season. [[62]](#footnote-63)62

The fundamental concepts embodied in a water bank - short-term, informal loans of water between users without the need for adjudication - are not new to ***Colorado*** water law. A temporary, informal loan statute has been on the books since 1899. [[63]](#footnote-64)63 It was not until 2001, however, that the ***Colorado*** General Assembly enacted legislation for a water banking pilot program in the Arkansas ***River*** Basin. [[64]](#footnote-65)64 The statute allowed the state engineer to establish a water bank and delegate its operations to the local water district, in this case, the Southeastern Water Conservancy District ("Southeastern"). [[65]](#footnote-66)65 The statute directed the state engineer, after consultation with the CWCB, to promulgate rules to balance in-and out-of-basin supply demands, prevent material injury to vested water users, and establish criteria to guide the state engineer in material injury determinations. [[66]](#footnote-67)66 The criteria related to depositing water in the bank, crediting withdrawal from the bank, administering the water within the priority system, and delegating the administration of the bank to a public or private entity. [[67]](#footnote-68)67 Although the statute authorized the state engineer to delegate administration of the bank to Southeastern, [[68]](#footnote-69)68 he retained exclusive authority to determine material injury without adjudication. [[69]](#footnote-70)69 The leased water, however, would still be subject to administration within the prior appropriation system. [[70]](#footnote-71)70 The statute eliminated the need to adjudicate the water bank transactions given their short-term nature **[\*58]** (year-to-year). [[71]](#footnote-72)71 The state engineer issued rules to govern the pilot program in 2002, [[72]](#footnote-73)72 and the bank "opened" for business for the 2003 irrigation season. [[73]](#footnote-74)73

Although the General Assembly had no information, during the 2003 legislative session, about whether or how the bank was working, [[74]](#footnote-75)74 the legislature extended the opportunity to create and operate banks to all water divisions in the state. [[75]](#footnote-76)75 For the most part, the legislature simply applied provisions of the 2001 legislation governing the pilot project to other banks and added criteria the state engineer had developed in his rulemaking. [[76]](#footnote-77)76 For instance, the legislation requires the state engineer to consult with the CWCB and allow time for public comment before issuing rules governing both the operation of the bank and limitations on transfers. [[77]](#footnote-78)77 These rules are subject to judicial review. [[78]](#footnote-79)78

Moreover, in part to limit the potential for injury as a result of a bank transaction, neither the pilot nor the other banks will allow blind deposits and withdrawals; rather, they will function like water "brokerages" where the state engineer or his delegate will match specific water rights proposed for deposit in the bank with specific water users looking to rent. [[79]](#footnote-80)79 However, House Bill 1318 does differ from the original pilot program in one important way: unlike the pilot, under House Bill 1318 water banks cannot lend water out of the basin of origin. [[80]](#footnote-81)80

Thus, the state engineer enjoys broad latitude to administer the state's water resources through the water banks, and can make water available immediately to mitigate drought conditions or promote economic development without the burdens of water court proceedings. Unlike the other statutes enacted during the 2003 legislative session that increase the authority of the state engineer, the water bank statute is not limited to drought emergencies; the legislature has authorized the banks' operation in perpetuity. [[81]](#footnote-82)81 Like **[\*59]** the other bills discussed below that increase the state engineer's authority to approve temporary transactions and determine material injury, [[82]](#footnote-83)82 the banking bill does create a potentially daunting process for would-be users to navigate. [[83]](#footnote-84)83 Thus, the jury remains out as to whether the transactions will be so cumbersome that the banks will not actually be able to offer water users seeking quick fixes an easier route than the water court has provided.

2. Instream Flow Protection

Another statute affecting the state engineer's authority to administer state water resources is House Bill 1320. The bill permits a water user to lend a diversionary right to the CWCB to protect one of that agency's junior instream flow rights during a season in which the governor has declared a drought or other emergency. [[84]](#footnote-85)84 The transaction does not require adjudication because the new law limits the loan to a single irrigation season. [[85]](#footnote-86)85 Therefore, the state engineer or his representative has the authority to determine material injury instead of the water court. [[86]](#footnote-87)86

The bill expands a temporary water loan statute from 1899. [[87]](#footnote-88)87 It is specifically designed to benefit instream flows, a beneficial use that did not exist in 1899. [[88]](#footnote-89)88 The original statute permitted agreements between water users on the same stream to save crops from drought or to use water in a "more economical manner" by allowing one user to loan or exchange water with another user for a "limited" time. [[89]](#footnote-90)89

The impetus for House Bill 1320 arose out of the plight of the Roaring Fork ***River***'s gold-medal fisheries during the 2002 drought. [[90]](#footnote-91)90 With the Roaring Fork reduced to a series of pools, its gold-medal fishery thus imperiled, and the CWCB's instream flow water right too junior to be in priority, the cities of Aspen and Glenwood Springs worked out a deal with the Salvation Ditch Company ("Salvation") to use the century-old loan statute to trade some of Salvation's senior water on the Roaring Fork ***River*** to Glenwood Springs for use on its ball fields. [[91]](#footnote-92)91 Aspen would have paid Salvation, and Glenwood Springs **[\*60]** would have received a municipal benefit. Most importantly, the water being loaned would have been protected from Salvation's headgate to Glenwood Springs, a distance of approximately fifty miles. The loan would have sustained flows for the fishery, while allowing downstream diversion and use. [[92]](#footnote-93)92

The state engineer received a proposal from the interested parties in which Salvation agreed to transfer five cubic feet per second ("cfs") downstream to Glenwood Springs for the remainder of the season. [[93]](#footnote-94)93 To the shock of the parties involved, the state engineer denied the request because the parties did not identify crops in critical need, and Glenwood Springs was not, in the eyes of the State, experiencing a drought emergency, at least insofar as its need for water for recreational facilities. [[94]](#footnote-95)94 Thus, ***Colorado***'s water administrator prohibited willing parties from loaning water to protect an instream water right.

Moved by the Roaring Fork saga, the ***Colorado*** legislature enacted a statute facilitating the kind of transfers requested by the stakeholders on the Roaring Fork. [[95]](#footnote-96)95 While the Roaring Fork interests had proposed a private transaction between users, [[96]](#footnote-97)96 the statute requires the participation of the CWCB, the only entity in ***Colorado*** authorized to hold non-diversionary water rights for the preservation of the instream environment. [[97]](#footnote-98)97 Thus, the new legislation allows the loans provided the CWCB agrees to the transaction.

The statute, however, does require notice to water users and an opportunity for them to comment on the proposal. [[98]](#footnote-99)98 The local representative of the state engineer, the division engineer for the area water division, determines if material injury will result. [[99]](#footnote-100)99 If he makes a determination of no injury, a water user claiming injury may make an expedited appeal to the water court. [[100]](#footnote-101)100 On the other hand, if the division engineer determines that injury will occur because he determines the conditions articulated in the statute are not satisfied, [[101]](#footnote-102)101 he has the authority to refuse the transaction. [[102]](#footnote-103)102

Despite the expanded authority of the state engineer or his representative to determine material injury, the new authority that **[\*61]** House Bill 1320 gives the state engineer is quite limited: there must be drought, the transfer is for a single season, and the transfer is exclusively to benefit a CWCB water right. [[103]](#footnote-104)103 Still, the statute allows these loans without an adjudication, and grants the state engineer authority to determine material injury, a power previously reserved for the water courts. In addition, that the General Assembly precluded water users from making trades for instream flow protection without the CWCB's participation and approval confirms the trend discussed in the second half of this article regarding the legislature's efforts to increase that agency's authority as well. [[104]](#footnote-105)104 Finally, as noted in the previous discussion on water banking, given the complexity of the administrative process fashioned by the legislature, it remains to be seen how often any water user will actually take advantage of this new tool.

3. Interruptible Water Supply Agreements

House Bill 1334 allows for interruptible water supply agreements ("IWSAs") - option contracts between two or more water rights holders that allow for the temporary transfer of the historic consumptive use of an absolute water right to a different use or place of use. [[105]](#footnote-106)105 The transactions enable entities with junior water rights, most often municipalities, to augment those rights, which may not be in priority during low water years, with more senior water rights, most often held by irrigators. [[106]](#footnote-107)106 Therefore, junior users are guaranteed a more reliable supply without developing "new" water or buying additional permanent supplies. House Bill 1334 gives the state engineer authority to approve interruptible water supply agreements during governor-declared emergencies. [[107]](#footnote-108)107

Interruptible water supply agreements infuse ***Colorado*** water resources administration with greater flexibility. For instance, a city can contract with an irrigator to use his water during drought years when the city's water rights are not in priority. [[108]](#footnote-109)108 The city pays both to retain the farmer as a reserve supplier and to use the farmer's water during drought events. [[109]](#footnote-110)109 This allows the farmer to make money during dry years without harvesting a crop, yet maintain ownership of his water right. [[110]](#footnote-111)110 At the same time, the arrangement provides the city a reliable water supply during emergencies. Both parties save time and money by avoiding the water court adjudication required were they to **[\*62]** apply for a permanent change of water right, an alternate point of diversion, place of use, or type of use. [[111]](#footnote-112)111

During the 2002 drought, entities, notably the City of Aurora, tried to implement IWSAs under legislation passed earlier that year which permitted temporary SSPs. [[112]](#footnote-113)112 However, the procedure governing IWSA transactions was ambiguous and the statutory language did not permit water transfers between basins. [[113]](#footnote-114)113 Furthermore, the legislation did not exempt IWSA transactions from water court adjudication. [[114]](#footnote-115)114 Therefore, willing parties faced spending significant resources to enter into IWSAs. [[115]](#footnote-116)115 Such high transaction costs foreclosed IWSAs to most potential irrigator-lessors; others were deterred from expending their economic resources because they feared the permanent loss of their water rights. [[116]](#footnote-117)116 Additionally, while farmers and ranchers were willing to lend water to thirsty cities on a temporary basis, many were uncomfortable with the limitations on future, long-term transfers that might result from court decrees allowing IWSAs. [[117]](#footnote-118)117

Motivated by these deficiencies and the severe drought, ***Colorado*** lawmakers enacted House Bill 1334, which expressly authorized IWSAs. [[118]](#footnote-119)118 The statute authorizes the state engineer to approve IWSAs after determining that no injury will occur to vested water users. [[119]](#footnote-120)119 Allowing the state engineer to make this decision enables interested parties to avoid costly and time-consuming water court adjudications. [[120]](#footnote-121)120 However, the state engineer's decision is subject to expedited review in water court. [[121]](#footnote-122)121 Moreover, IWSAs approved under House Bill 1334 are limited to times when the governor has declared a drought or other emergency and the first full year thereafter. [[122]](#footnote-123)122

As with the water banking and instream flow protection bills, the interruptible water supply agreement legislation increases the authority of the state engineer, particularly insofar as it authorizes the state engineer to make determinations about material injury. Additionally, as with the temporary instream protection statute, the legislation effectively increases the flexibility of water rights administration during drought because it eliminates the need to obtain water-court approval prior to transferring water to a different **[\*63]** place and use.

It is interesting to note, however, that in both House Bills 1320 and 1334, the General Assembly directed the state engineer to use a quasi-judicial procedure in making his material injury determination. [[123]](#footnote-124)123 The applicant must provide notice to interested parties and the application must include a detailed written report prepared by a professional engineer. [[124]](#footnote-125)124 The state engineer must allow thirty days for other water rights holders to file comments on the proposed agreement. [[125]](#footnote-126)125 These comments may include claims of injury and conditions to the agreement to avoid injury. [[126]](#footnote-127)126 After considering the comments, the state engineer, much like a water judge, is to render a decision regarding the temporary agreement and impose conditions ensuring no injury to other water users. [[127]](#footnote-128)127 However, while the water judge cannot refuse to hear a case, the state engineer has discretion in deciding whether to hold a formal hearing. [[128]](#footnote-129)128 On a finding of no injury, a water user who disagrees may file an expedited appeal to the water court. [[129]](#footnote-130)129 This process appears designed to protect senior water rights holders in much the same way as water court proceedings.

4. Substitute Supply Plans

The remaining bills enacted in the suite of legislation increasing the authority of the state engineer were aimed at resolving an on-going conflict between ***Colorado***'s executive branch and judiciary over water rights administration. This particular dispute continued to smolder even after legislative attention in 2002 due to the increasingly severe drought conditions that gripped the state that summer. A brief overview of the events leading to the 2003 legislative enactments follows.

Since shortly after passage of the 1969 Act, the state engineer has approved SSPs on a year-to-year basis. [[130]](#footnote-131)130 Substitute supply plans are temporary augmentation plans that permit new water users to divert water out of priority, [[131]](#footnote-132)131 pending court approval of their augmentation plans. [[132]](#footnote-133)132 With SSPs, public or private entities "may provide a substituted supply of water to … appropriators senior to them." [[133]](#footnote-134)133 As long as such substituted supply is available to meet the senior's requirements, the rights of the senior "shall be deemed to be **[\*64]** satisfied." [[134]](#footnote-135)134 The substituted water must be "of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put." [[135]](#footnote-136)135 The effect of this provision is to allow what are effectively involuntary exchanges of water so long as no injury results to the senior appropriators. The exchanges are "involuntary" because the senior water rights holder must accept the substituted supply if the conditions are satisfied. [[136]](#footnote-137)136 In practice, for close to three decades, the state engineer approved SSP plans, often for decades at a time. In fact, the state engineer even approved SSPs where the water user had not actually filed an application for a permanent augmentation plan. [[137]](#footnote-138)137 Many of the SSPs allowed junior irrigation well users to pump for years even though they were out-of-priority. [[138]](#footnote-139)138

Along the South Platte ***River***, the long, hot, dry summer of 2002 tested the limits of senior appropriators' tolerance for out-of-priority diverters whose replacement water they believed inadequate. While senior water users might have continued to accept the SSP system had reservoirs remained full and ***rivers*** kept running deep, as ***Colorado*** entered its third year of drought, vested water rights holders were unwilling to look the other way while unadjudicated, out-of-priority diversions caused injury to their decreed water rights, such rights often having been acquired at great expense. [[139]](#footnote-140)139

***Colorado*** lawmakers were determined to find a short-term legislative solution that would allow out-of-priority wells to continue pumping (thereby saving affected farms and rural communities), but also would recognize the water court's determination that the state engineer's continuing approval of SSPs from year-to-year exceeded his statutory authority. [[140]](#footnote-141)140 Following intense negotiations involving the state engineer, entities operating under SSPs, and senior water users, the legislature passed two bills to accomplish these goals. [[141]](#footnote-142)141 Senate Bill 73 allows water users in the South Platte to obtain SSPs under certain, limited conditions, but only for three more years while they "get **[\*65]** legal." [[142]](#footnote-143)142 House Bill 1001 is more expansive. Given its permanent, statewide scope, the bill actually increases the state engineer's SSP powers. [[143]](#footnote-144)143

Senate Bill 73 has four main provisions. First, the state engineer, when considering an SSP, must (1) provide notice to interested parties so objectors can challenge the application, and (2) conduct a detailed comment and hearing process. [[144]](#footnote-145)144 Second, the bill allowed parties to make an expedited appeal to the water court. [[145]](#footnote-146)145 Third, all users operating under SSPs must file for an augmentation plan by December 31, 2005. [[146]](#footnote-147)146 Fourth, if the state engineer discovers well users are pumping without an application for a decreed augmentation plan, the state engineer must curtail those wells without exception. [[147]](#footnote-148)147

House Bill 1001 picks up where Senate Bill 73 leaves off by providing the state engineer with new, expansive, and permanent statewide authority to approve SSPs when a water user applies for either an augmentation plan or a change of water right. [[148]](#footnote-149)148 Allowing SSPs for a change of water right is a significant expansion of the state engineer's SSP authority. This expansion makes sense in a change situation because it allows entities like municipalities that normally have enough water to contract with a willing party, like an irrigation ditch company, both during times of drought and while the entity's change application winds its way through water court proceedings. [[149]](#footnote-150)149 Also, House Bill 1001 allows a water user who repairs or improves a storage structure owned by a third party, so as to remove a storage restriction imposed by the state engineer, to apply to use the newly unrestricted storage as part of a SSP. [[150]](#footnote-151)150 Under House Bill 1001, moreover, the state engineer can approve SSPs on a year-to-year basis, for up to five years. [[151]](#footnote-152)151 In approving the SSP, the state engineer makes a determination regarding material injury, which cannot be appealed separately from the underlying water rights case involving the augmentation plan or change. [[152]](#footnote-153)152

**[\*66]** Unlike Senate Bill 73, House Bill 1001 provides that once the state engineer makes a determination of no material injury, he need not conduct any additional formal proceeding. [[153]](#footnote-154)153 The state engineer can even extend an SSP beyond the statutory three-year period if the applicant justifies the reason for the delay in obtaining its water court decree. [[154]](#footnote-155)154 Furthermore, under Senate Bill 73, water users may use existing surface rights as replacement water for an SSP even if such rights are not decreed for replacement so long as the state engineer prevents expanded use. [[155]](#footnote-156)155

Ultimately, both bills clarify that SSPs are merely a stopgap measure temporarily allowing diversions pending water court adjudication of augmentation plans. But, while Senate Bill 73 reduces the scope of the state engineer's authority to approve South Platte ***River*** basin SSPs from year-to-year in perpetuity, House Bill 1001 effectively expands the state engineer's powers statewide.

C. Synthesis

This suite of new legislation raises an important question about water administration in ***Colorado***, particularly insofar as it gives the state engineer a substantial role in making at least short-term material injury determinations. ***Colorado***, alone among other western states, has resisted vesting authority in its executive branch to determine water rights. While all other western states have migrated to a permit system, with an administrative agency granting users rights to use water, ***Colorado*** has kept the exclusive power to determine water rights with the courts.

***Colorado***'s approach has advantages and disadvantages. [[156]](#footnote-157)156 However, there is no question that empowering the state engineer to determine material injury, and not just during drought or emergency situations, recognizes that the court system is not flexible enough to address all of the legitimate water rights transactions that arise in today's fast-paced world. The next question for the legislature is whether the state engineer's new authority is sufficient, or whether the times demand an even broader transfer of power from the courts to the administrator.

**[\*67]**

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). LEGISLATURE EXPANDS AUTHORITY OF ***COLORADO*** WATER CONSERVATION BOARD AND ***COLORADO*** WATER RESOURCES AND POWER DEVELOPMENT AUTHORITY

Most of the fifteen inches of precipitation ***Colorado*** receives annually falls as snow and remains in the mountains through the winter. [[157]](#footnote-158)157 In the spring, snowmelt runoff fills ***rivers*** and streams to flood stage. Without storage structures, this water would flow through - and out of - ***Colorado***, leaving the state's ***rivers*** low for the rest of the year. Although the natural hydrograph supported native species and ecosystems, people wanted water at times and places where it was not naturally available. To accommodate these needs and to carry over excess water from wet years to dry, ***Colorado*** water users have built increasingly elaborate water storage and diversion systems over the last 150 years. [[158]](#footnote-159)158 In these structures, the State stores roughly six million of the seventeen million acre-feet of water ***Colorado*** receives annually. [[159]](#footnote-160)159 The remainder flows out of ***Colorado***, almost all of it to satisfy interstate compact obligations and equitable apportionment decrees. [[160]](#footnote-161)160

For the most part, local water users and the federal government have played the dominant roles in building, operating, and maintaining these systems. [[161]](#footnote-162)161 Until now, the State's role in developing water has been modest. [[162]](#footnote-163)162 However, the legislation enacted by the 2003 General Assembly suggests the State may assume a more active role in water development, at least in planning and financing new water supplies, if not in constructing or operating water delivery systems. [[163]](#footnote-164)163

This section first examines the historical roles of the federal government, local water users, and the State in constructing and financing water projects. The section then outlines the ***Colorado*** General Assembly's 2003 legislation that significantly increased state agency authority over water development planning and financing. Finally, this section considers whether this recent legislative action represents an incremental or more significant change in the balance **[\*68]** of power for water development

A. The Federal Government: From Development to Management

During the late nineteenth and early twentieth centuries, the federal government actively promoted emigration to the American West. [[164]](#footnote-165)164 Heavily subsidized federal water projects helped keep nineteenth century settlers on the land of the Great American Desert, [[165]](#footnote-166)165 after it became clear that, without reliable water supplies, they would leave. In the latter half of the twentieth century, this federal support declined. [[166]](#footnote-167)166 In a remarkable reversal of mission, the federal government today at least pays lip service to encouraging conservation through effective water management rather than promoting new development. [[167]](#footnote-168)167

1. The Bureau of Reclamation: Water Developer

With the Reclamation Act of 1902, [[168]](#footnote-169)168 Congress adopted a "national water development program" [[169]](#footnote-170)169 that included a new agency, the Bureau of Reclamation ("the Bureau"), to build the necessary water infrastructure. [[170]](#footnote-171)170 Initially, Congress envisioned the Bureau building single purpose projects that would deliver irrigation water. [[171]](#footnote-172)171 Over time, Congress added municipal use, hydropower (a major source of income to the federal government) [[172]](#footnote-173)172 and eventually, recreation and environmental uses. [[173]](#footnote-174)173 Congress originally expected project beneficiaries to repay the federal investment; however, over time, Congress significantly relaxed the repayment requirements, as it became clear that the beneficiaries could not fully repay the federal investment. [[174]](#footnote-175)174

**[\*69]** Reclamation projects in ***Colorado*** enabled much of the success of the state's agricultural sector and have also supported its dramatic municipal growth. Projects built in ***Colorado*** during the twentieth century reflect the expanded uses of project water and the Bureau's changing mission and values. Some of the larger Bureau projects in ***Colorado*** include:[[175]](#footnote-176)175

| **Project Name** | **Built** | **Major Features** | ***River*** | **Purpose** |
| --- | --- | --- | --- | --- |
|  |  |  | **Basin** |  |
| Uncompahgre | 1937 | Taylor Park | Gunnison | Irr.[su'b'], |
|  |  | Reservoir |  | Rec.[su'c'], |
|  |  | (106,230AF[su'a']; |  | F&W[su'd'], |
|  |  | Gunnison Tunnel |  | FC[su'e'] |
|  |  | (1100 cfs). |  |  |
| ***Colorado***-Big | 1957 | 12 Reservoirs | ***Colorado***, | Irr., |
| Thompson |  | (including | South | M&I[su'f'], |
|  |  | Granby, Estes and | Platte | Rec., FC, |
|  |  | Green Mountain), |  | HP[su'g'], CS[su'h] |
|  |  | the 35 mile Adams |  |  |
|  |  | Tunnel, 95 miles |  |  |
|  |  | of canals and 700 |  |  |
|  |  | miles of |  |  |
|  |  | transmission lines, |  |  |
|  |  | Average annual |  |  |
|  |  | diversion |  |  |
|  |  | 260,00AF. |  |  |
| Aspinall | 1978 | Blue Mesa, | Gunnison | Irr., |
|  |  | Morrow Point, |  | M&I, |
|  |  | and Crystal |  | Rec., |
|  |  | Reservoirs. Active |  | F&W, |
|  |  | Storage Capacity: |  | HP, FC |
|  |  | 803,441AF. |  |  |
| Frying-Pan | 1973 | Reudi, Turquoise, | Arkansas, | Irr., |
| Arkansas |  | Twin Lakes and | ***Colorado*** | M&I, |
|  |  | Pueblo Reservoirs. |  | F&W, |
|  |  | Total Capacity: |  | FC, Rec., |
|  |  | 630,304 AF |  | HP |
| Dolores | 1985 | McPhee Reservoir | San Juan, | Irr., |
|  |  | (Total Capacity: |  | M&I, |
|  |  | 381,195AF); Great |  | F&W |
|  |  | Cut Dike. Average |  | Rec., FC, |
|  |  | Annual Diversion: |  | HP, ED |
|  |  | 90,900AF. |  |  |
| Animas- |  | Ridges Basin | San Juan | M&I, |
| LaPlata |  | Reservior, |  | Tribal |
|  |  | Durango Pumping |  |  |
|  |  | Durango Pumping |  |  |
|  |  | Plant. Projected |  |  |
|  |  | Annual Diversion: |  |  |
|  |  | 57,100 AF |  |  |

**[\*70]** a. AF=Acre-Feet.

b. Irr.=Irrigation.

c. Rec.=Recreation.

d. F&W=Fish and Wildlife.

e. FC=Flood Control.

f. M&I=Municipal and Industrial.

g. HP=Hydro-Electric Power.

h. Compensatory Storage.

i. Economic Redevelopment.

With the dramatic exception of hydropower generation, the costs to the federal government of building these Bureau projects almost always outweighed the economic returns. As a result, these Bureau projects dramatically altered entire ***river*** basins that would have been left in their natural state but for the federal subsidy. [[176]](#footnote-177)176 This is due, in part, to Bureau projects being too big and expensive for private interests to finance and build. [[177]](#footnote-178)177 Private water development projects cost from three to eight times less per acre of irrigated land than projects funded and built under the Reclamation Act. [[178]](#footnote-179)178 Unfortunately, at these prices, the agricultural beneficiaries of the Bureau projects, in particular, have been unable to generate sufficient revenues to repay the federal government's investment. [[179]](#footnote-180)179 Thus, the **[\*71]** most recent modifications to the 1902 Act include a wholesale shift from water development to water resource management. [[180]](#footnote-181)180

2. The Bureau of Reclamation: Water Manager.

The first sign that the Bureau's primary mission would change from building and operating large dams and diversion projects to water management came in 1977, when President Carter issued his infamous "hit list." [[181]](#footnote-182)181 Determined to balance the federal budget in the face of runaway inflation and a deficit of nearly one trillion dollars, the President naively suggested eliminating construction of new water projects requiring large federal subsidies. [[182]](#footnote-183)182 Assisted by Carter's incredibly poor timing - ***Colorado*** and the other western states were in the midst of a severe drought - powerful western interests defeated this initiative. [[183]](#footnote-184)183 But, the Western states' victory did not mean the hit list projects would be built. [[184]](#footnote-185)184

While President Reagan never discussed a hit list, as a practical matter his administration essentially followed Carter's plan, albeit in the name of "fiscal conservatism." [[185]](#footnote-186)185 Thus, Reagan proposed, and Congress adopted, legislation that not only slashed $ 2 billion from seven proposed dam projects, but also required local interests to fund significant portions of water development projects. [[186]](#footnote-187)186

In 1987, the Bureau released a report signaling a change in its mission: the Bureau wanted out of the big dam building business. [[187]](#footnote-188)187 The landmark report states: "The Bureau's primary role as the developer of large, federally financed agricultural projects is drawing to a close… . The Bureau of Reclamation must change from an agency based on federally supported construction to one based on resource management." [[188]](#footnote-189)188 Rather than building more large-scale water infrastructure projects, the Bureau sought to use its existing network of storage and distribution facilities to allow for "exchanges in type, location or priority of use … according to State law … allowing water to be used more efficiently to meet changing water demands, and also … protect and enhance the Federal investment in existing **[\*72]** facilities." [[189]](#footnote-190)189 The report even listed principles to facilitate the Bureau's new policy of water management. [[190]](#footnote-191)190

In the 1990s, the Bureau's mission continued to evolve. President Clinton's first Commissioner of Reclamation, Dan Beard, issued a bold plan to reform the Bureau from an agency with a focus on dam construction to a water resources management agency. [[191]](#footnote-192)191 In 1994 Beard stated that the "traditional approach for solving problems - the construction of dams and associated facilities - is no longer publicly acceptable. We [the Bureau] are going to have to get out of the dam building business. Our future lies with improving water resource management and environmental restoration activities, not water **[\*73]** project construction." [[192]](#footnote-193)192 Although Beard's stint as Bureau commissioner was short-lived, his vision lives on in a greatly reduced federal role in constructing water projects, and in an increased role in managing existing projects.

Most recently, in 2001, President George W. Bush's Secretary of the Interior Gale Norton asked the Bureau to assess existing water supplies and identify areas in which water supplies are likely to be insufficient to meet water demand over the next twenty-five years. [[193]](#footnote-194)193 The result, dubbed Water 2025, is another effort to redefine the Bureau's mission and encourage conservation rather than new construction, and voluntary water transfers rather than unilateral federal action. [[194]](#footnote-195)194

B. Local Water User Organizations: The Mainstay of ***Colorado*** Water Development.

Local water user organizations, such as ditch companies, water districts, and municipalities, are the other major category of water project sponsors in ***Colorado***. Since early in ***Colorado***'s state history, the state legislature has recognized a wide variety of water user organizations and explicitly given them the authority necessary to develop water and the ability to tax. The result has been that - aside from the Bureau - ditch companies, water districts, and municipalities provided capital for and built most of ***Colorado***'s water projects. These entities have been active participants in developing ***Colorado***'s water resources for over a century. [[195]](#footnote-196)195 Moreover, unlike the Bureau, all of these entities continue to play an active role in developing new water supplies. [[196]](#footnote-197)196

**[\*74]**

1. Ditch Companies

Ditch companies assumed a variety of different forms as water development in ***Colorado*** became increasingly complex. [[197]](#footnote-198)197 Joint, [[198]](#footnote-199)198 mutual [[199]](#footnote-200)199 and carrier [[200]](#footnote-201)200 ditch companies allow for a considerable degree of flexibility in permitting private water users to join forces for water development. The ditch company holds a single priority right; however, within the company, there is substantial flexibility to allow temporary exchanges between shareholders to deliver water to users with the greatest need. [[201]](#footnote-202)201

For example, Farmer's Ditch, completed in 1862, was the first source of water for most of Boulder and by 1890 irrigated approximately 2500 acres of farmland. [[202]](#footnote-203)202 The ditch supplied water to power a four mill, facilitated intensive agriculture in north Boulder, and provided water to allow for new housing developments after World War II. [[203]](#footnote-204)203 Farmer's Ditch is still in use today irrigating hundred of acres north of the city of Boulder. [[204]](#footnote-205)204

Another example of the importance of water to early irrigators appeared with the creation of the Boulder and White Rock Ditch Company in 1873. [[205]](#footnote-206)205 The ditch runs for twenty-five miles to the Weld County border. [[206]](#footnote-207)206 The ditch was capitalized with $ 20,000 (an exorbitant sum in the late nineteenth century) by the issuance of stock **[\*75]** to local farmers. [[207]](#footnote-208)207 The Ditch Company owns very little of the land under its ditch, but possesses an easement under and along the ditch. The easement allows the Ditch Company to run the shareholder's water and includes the right to enter the easement for repair and maintenance. [[208]](#footnote-209)208 In addition to the historical benefit of providing water to farmers and cities, ditches like White Rock are valued today for the riparian corridor it creates for recreation and urban habitat for animals, fish and birds. [[209]](#footnote-210)209

2. Water Districts

Water districts are a second category of water user organization. ***Colorado***'s three statutorily created conservation districts primarily exist to protect the interests of water users in their areas and promote water development. [[210]](#footnote-211)210 Thus, they usually do not build their own projects and are not directly water suppliers. [[211]](#footnote-212)211 However, they are often engaged in negotiations regarding both Bureau and other entities' new projects. For example, the ***Colorado*** ***River*** Water Conservation District ("***River*** District") played an integral role in the creation of ***Colorado***'s first compensatory storage project - Green Mountain Reservoir - built as part of a Bureau project to enable water development in the basin of origin where the primary project takes large amounts of water out of the basin. [[212]](#footnote-213)212 The Southwestern ***Colorado*** Water Conservation District has played a pivotal role in championing the Bureau's Animas-La Plata project, now under construction, that is being built to meet the requirements of the 1988 Indian Water Rights Settlement Agreement. [[213]](#footnote-214)213 And, the ***River*** District also helped conceive and construct Wolford Mountain Reservoir, which it now operates, as a joint project with Front Range diverters to provide water on both sides of the Continental Divide. [[214]](#footnote-215)214

**[\*76]** Irrigation [[215]](#footnote-216)215 and conservancy [[216]](#footnote-217)216 districts often form to receive the benefits of a Bureau project, but they also build projects of their own. For example, the Northern ***Colorado*** Water Conservancy District ("Northern") is the beneficiary of the Bureau's ***Colorado***-Big Thompson project; [[217]](#footnote-218)217 in addition, its municipal sub-district built and operates the Windy Gap project, to bring an additional 48,000 acre-feet of water to Northern's Front Range water users. [[218]](#footnote-219)218 Northern is currently engaged in an effort to expand the Windy Gap project. [[219]](#footnote-220)219 Similarly, the Southeastern ***Colorado*** Water Conservancy District is the beneficiary of the Bureau's Fryingpan-Arkansas Project, [[220]](#footnote-221)220 but is also engaged in trying to add new capacity to that project. [[221]](#footnote-222)221 Finally, the Uncompahgre Valley Water Users Association, an irrigation district, operates and maintains the Bureau's Uncompahgre Project, [[222]](#footnote-223)222 but is **[\*77]** also seeking to construct a major hydropower facility of its own. [[223]](#footnote-224)223

3. Municipalities

A third local-level water development category is ***Colorado***'s cities and towns. Cities may construct, condemn, purchase, lease, operate, and maintain their own water supply facilities. [[224]](#footnote-225)224 Moreover, ***Colorado***'s constitution acknowledges water used by cities and towns as a preferred use, [[225]](#footnote-226)225 and gives cities the authority to legislate, regulate, and control the management of water organizations. [[226]](#footnote-227)226 Further, the "Great and Growing Cities Doctrine" allows municipalities to acquire water without having to put the water immediately to use - something that would constitute illegal speculation for other water users. [[227]](#footnote-228)227 Because cities' appropriations are often quite junior, they frequently engage in non-traditional development to ensure reliable water supplies. [[228]](#footnote-229)228 In addition to the widespread practice of buying more senior agricultural water rights for conversion to municipal purposes, some cities have entered into exchange agreements allowing the city to divert an irrigator's right upstream of the irrigator's point of diversion and replace it with treated effluent. [[229]](#footnote-230)229 Cities also lease surplus water to one another, and if a city's population is greater than 200,000, it may lease water to another city without a determination of material injury by the water court. [[230]](#footnote-231)230

For example, the Board of Denver Water Commissioners ("Denver"), established in 1918, is the largest appropriator of water rights for municipal use in ***Colorado***, and supplies approximately 265,000 acre-feet of water per year to over 1,080,000 people in the Denver metro area. [[231]](#footnote-232)231 Denver has acquired, built and operated its **[\*78]** facilities wholly without federal or state financing. [[232]](#footnote-233)232 Other large Front Range cities, including ***Colorado*** Springs and Aurora, have also built and now operate extensive water supply and delivery systems. [[233]](#footnote-234)233

4. Continuing Development

As noted above, and unlike the Bureau, these local entities, and in particular the water conservation/conservancy districts and municipalities, are still hard at work developing water projects. Thus, even if one might have worried that the Bureau's exit from active water project development created a vacuum in ***Colorado***, there is abundant evidence that local providers have stepped into the breach. As a result, a major state entry into the field of water development, as described below, is no more warranted in the twenty-first century than it was necessary in the nineteenth or twentieth centuries.

For example, as this article is being written, at least four projects sponsored by cities and a water district are simultaneously moving through the National Environmental Protection Act scoping process, in anticipation of these entities applying for permits and a carriage contract. These four projects are: Denver's Moffat Collection System, [[234]](#footnote-235)234 the Northern ***Colorado*** Water Conservancy District's Windy Gap Firming Project, [[235]](#footnote-236)235 the City of Aurora's Fryingpan-Arkansas Project carriage contract, [[236]](#footnote-237)236 and the City of ***Colorado*** Springs' Southern Delivery System. [[237]](#footnote-238)237 Just these four projects would, if developed as **[\*79]** currently described, deliver more than 138,000 additional acre feet of water to Front Range communities, over one third of which would come from the ***Colorado*** ***River*** Basin. [[238]](#footnote-239)238

C. State Agencies and Their Enlarged Role as a Result of the 2003 Legislation.

Historically, state agencies played a minor role in water development, leaving the financing and construction of water infrastructure projects to the Bureau and local entities. [[239]](#footnote-240)239 Spurred at least in part by the drought, the state legislature passed several bills that open the door to a substantial expansion of the State's role in water resource development, particularly with regard to planning and financing projects.

1. Historical Roles.

a. ***Colorado*** Water Conservation Board ("the CWCB")

Before 1937, the state engineer had explicit authority to administer ***Colorado***'s water resources and implicit authority to develop them. [[240]](#footnote-241)240 While the state engineer actively administers ***Colorado***'s water resources, no evidence exists that his office ever engaged in water development. The Dust Bowl drought of the 1930s [[241]](#footnote-242)241 prompted the state legislature to create the CWCB specifically to encourage water development, leaving the state engineer responsible solely for water administration. [[242]](#footnote-243)242

The CWCB's statutory mandate is to "aid[] in the protection and development of the waters of the state for the benefit of the present **[\*80]** and future inhabitants of the state." [[243]](#footnote-244)243 The CWCB's primary objectives are to: (1) represent state-wide water interests aimed at creating efficient water policies, (2) facilitate communication among water agencies, (3) represent ***Colorado*** in interstate water matters and federal actions that conflict with state water management goals, and (4) formulate state-wide water policies. [[244]](#footnote-245)244 The CWCB's duties include: (a) conducting water studies for the "unified and harmonious development of all waters for beneficial use in ***Colorado***," [[245]](#footnote-246)245 (b) funding small water development projects, [[246]](#footnote-247)246 and (c) coordinating water resources management with the federal government and other states. [[247]](#footnote-248)247 More recently, and somewhat ironically, given the CWCB's clear development mission, the legislature authorized the CWCB as the sole entity within ***Colorado*** to appropriate instream flow rights (i.e. water rights with no diversion) "to preserve the environment to a reasonable degree." [[248]](#footnote-249)248

The CWCB is most directly involved in water development through its construction fund program. [[249]](#footnote-250)249 The fund operates on a revolving basis, with the legislature appropriating money for individual project expenditures annually. [[250]](#footnote-251)250 The program receives funds out of general state appropriations, although the CWCB supplements the fund with fees it assesses. [[251]](#footnote-252)251 Subject to certain conditions, [[252]](#footnote-253)252 the CWCB may also contract with private sponsors such as individuals, corporations, or state or federal agencies for the use of water and power supplied by water projects owned or operated by the State. [[253]](#footnote-254)253 The CWCB chooses projects it decides will "promote the general welfare and safety of the citizens" of ***Colorado***, [[254]](#footnote-255)254 incorporate all reasonable water conservation measures, and benefit multiple, rather than single, purposes. [[255]](#footnote-256)255 Grant recipients must have the power to assess ad valorem taxes to offset operating and maintenance costs, acquire the land and water rights needed for the project, pay 50% of the cost of the feasibility study, [[256]](#footnote-257)256 and repay the CWCB's financial contribution to the feasibility study by **[\*81]** the time project construction begins. [[257]](#footnote-258)257 The CWCB secures its investment by taking all or a substantial portion of the title to the project until the sponsor repays the fund. [[258]](#footnote-259)258 Finally, the CWCB may "enter into contracts … necessary for the maintenance and continued operation of such projects." [[259]](#footnote-260)259 The CWCB allocates construction fund dollars for construction costs, investigations, engineering, or other expenses. [[260]](#footnote-261)260 In 2003, the General Assembly authorized $ 20.8 million in new spending out of the construction fund. [[261]](#footnote-262)261

Effectively, then, the CWCB serves as the State's water policy voice. This includes its role as the guardian of ***Colorado***'s compact rights and as the defender of the State's allocation system against perceived federal interference. In addition, the CWCB has a modest role in water development, through its ability to make grants from the construction fund. And, the CWCB has the exclusive authority to appropriate instream flow water rights.

b. ***Colorado*** Water Resources and Power Development Authority ("the Authority")

In 1981, the ***Colorado*** General Assembly created the ***Colorado*** Water Resources and Power Development Authority ("the Authority") with a $ 30 million appropriation from the CWCB construction fund. [[262]](#footnote-263)262 The Authority can "initiate, acquire, construct, maintain, repair, and operate projects or cause the same to be operated pursuant to a lease, sublease, or other agreement with any person or governmental agency and may issue its bonds and notes payable solely from revenues to pay the cost of such projects." [[263]](#footnote-264)263 The Authority coordinates with the CWCB. For example, the CWCB performs the feasibility studies for projects for which the Authority wants to issue bonds; the CWCB also makes recommendations to the General Assembly regarding such projects. [[264]](#footnote-265)264 Unlike the CWCB, the Authority has no other mission, and no policy role; it exists solely to provide financing for water development projects. [[265]](#footnote-266)265

Eligible projects under this statute include, but are not limited to, water conveyance systems, wells, storage facilities, and necessary infrastructure for hydropower plants. [[266]](#footnote-267)266 The Authority has the power **[\*82]** to issue tax-exempt revenue bonds to pay for these facilities. [[267]](#footnote-268)267 Since the principal and interest are payable solely from the revenues generated by the sale of water and hydropower, the bonds do not create a debt prohibited by the ***Colorado*** Constitution. [[268]](#footnote-269)268

Most of the projects built to date with Authority bonds are wastewater and drinking water treatment facilities, and for each of these types of facilities, the Authority operates a revolving fund, [[269]](#footnote-270)269 replenished both from bond revenue and from federal grants from the Environmental Protection Agency. [[270]](#footnote-271)270 Until 2002, the Authority needed legislative approval to issue bonds for more than $ 25 million; [[271]](#footnote-272)271 in 2002, the General Assembly removed legislative oversight for projects less than $ 100 million, and in 2003, the General Assembly raised the threshold for legislative oversight to $ 500 million. [[272]](#footnote-273)272 Still, each year, the General Assembly passes a joint resolution endorsing the projects the Authority finances. [[273]](#footnote-274)273 Aside from wastewater and drinking water projects, the Authority provided financing for Stagecoach Reservoir, [[274]](#footnote-275)274 and is involved in providing the State's $ 42 million share of the Bureau's Animas-La Plata Project. [[275]](#footnote-276)275

2. The 2003 Legislature Expanded Authority for Selection and Financing for Water Development Projects.

a. Drought: Driving the General Assembly

News stories and analysis have characterized the summer of 2002 as the worst single-year drought on record in ***Colorado***. [[276]](#footnote-277)276 In July 2002, the governor called the General Assembly into special session to address fire and drought issues, [[277]](#footnote-278)277 although they enacted no significant drought legislation. [[278]](#footnote-279)278 By the beginning of 2003, the drought's adverse **[\*83]** effect on the economy, [[279]](#footnote-280)279 coupled with the public angst over a summer of brown lawns, city parks, and playing fields, pressured the legislature to act. [[280]](#footnote-281)280

As noted in the introduction to this article, the legislature adopted four resolutions mentioning the drought as the impetus. [[281]](#footnote-282)281 The General Assembly also invoked the drought in substantive legislation - declaring, for example, that ***Colorado*** was experiencing its fourth consecutive year of drought and that the state would likely experience similar drought cycles in the future. [[282]](#footnote-283)282 The legislature also recognized that drought cycles reduce both the quantity and quality of water available for ***Colorado***'s existing and future water users. [[283]](#footnote-284)283 The legislature further declared ***Colorado***'s existing water infrastructure as deficient in its ability to provide sufficient drought relief because it would not allow the state to use its compact entitlements to the fullest, requiring the General Assembly to "expedite the development and improvement of ***Colorado***'s water infrastructure." [[284]](#footnote-285)284

In response to the drought, the legislature enacted four provisions, described below, each of which increases state agency authority. Taken together, these bills conceive a larger role for state agencies, in terms both of financing water projects and of recommending those locally-sponsored water projects most in the state's overall interests.

b. Planning: the Statewide Water Supply Initiative ("SWSI") Points to State Involvement in Identifying Development Projects.

At the request of the CWCB, [[285]](#footnote-286)285 the ***Colorado*** legislature appropriated $ 3 million for the CWCB to conduct a study that, first, inventories existing water supplies and future water supply needs **[\*84]** statewide, [[286]](#footnote-287)286 and [*second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), makes a recommendation regarding both basin-specific and statewide alternatives to meet those needs. [[287]](#footnote-288)287 The final product is a report due back to the General Assembly on or before December 1, 2004. [[288]](#footnote-289)288

The stated objective of the SWSI is to ensure ***Colorado*** has adequate water supplies for its citizens. [[289]](#footnote-290)289 The CWCB has hired a contractor who has formulated, together with CWCB staff, a statement of work that structures and defines how the study will proceed. [[290]](#footnote-291)290

With little explicit guidance in the statute, [[291]](#footnote-292)291 the CWCB has adopted a detailed statement of work covering five different phases of the investigation, including: (1) an overall public involvement component; (2) basin and statewide inventories of available needs and supplies in light both of information known about drought cycles in ***Colorado*** and projected growth data; (3) identification, evaluation and selection of alternative supply and demand management options for each basin; (4) development of implementation strategies to package groups of water projects for financing and development; and (5) proposing a framework for the CWCB to manage implementation of its proposed alternative. [[292]](#footnote-293)292 CWCB staff and the CWCB contractor will do much of the work for these phases, assisted by basin advisors consisting of participants selected by the CWCB. [[293]](#footnote-294)293 Moreover, to roll basin plans into a single statewide alternative the CWCB members themselves will take the lead in achieving the statewide consensus for which the statute calls. [[294]](#footnote-295)294

What is striking about the SWSI is that it is ***Colorado***'s first state-wide planning exercise. Previously, ***Colorado*** water interests have operated as if the only state water plan ***Colorado*** needed was the prior appropriations system itself. [[295]](#footnote-296)295 Vesting a state agency with the authority to craft a state-wide water plan and to reconcile the needs of competing basins, potentially inserts the State into the very center of the transmountain diversion battles as to which it has always previously **[\*85]** remained on the sidelines. At a time of limited state resources and an executive branch which espouses limited government, the SWSI is a dramatic departure in the water arena from past practice and ideology, a move that can only be understood in light of the pressure the drought created for State action.

c. A State Water Project? The ***Colorado*** ***River*** Return Project ("Big Straw")

The ***Colorado*** ***River*** Return Project is a plan to collect 250,000 to 750,000 acre feet of ***Colorado*** ***River*** water and pump it from the Utah border 4500 feet and 200 miles back to the Continental Divide for use primarily on the Front Range. [[296]](#footnote-297)296 The estimated cost is between $ 3.7 and $ 15 billion. [[297]](#footnote-298)297 As originally conceived in the mid-1980s, the Big Straw would have taken water through an infiltration gallery with a passive wetland serving to improve the warm, saline and selenium-contaminated water at ***Colorado***'s border with Utah, pump it through a series of tunnels and pipes mostly along the I-70 corridor (including Glenwood Canyon) to Denver's Lake Dillon, and finally through Denver's Roberts Tunnel for distribution to Front Range water users. [[298]](#footnote-299)298 Many who oppose the project believe it is simply infeasible; for example, one commentator calculated the pumping costs alone as exceeding $ 150 million annually and would require a new power plant just to serve the project. [[299]](#footnote-300)299

However, at the request of the CWCB, the ***Colorado*** legislature authorized the Board to spend up to $ 500,000 (a scarce, if small, sum of money for a state with a budget deficit running into the hundreds of millions of dollars) [[300]](#footnote-301)300 for a technical feasibility study to be completed in November 2003. [[301]](#footnote-302)301 Proponents of the project note **[\*86]** ***Colorado*** has never fully developed its ***Colorado*** ***River*** Compact entitlement. [[302]](#footnote-303)302 While the exact amount of the undeveloped portion is the subject of dispute, the General Assembly stated in one of its joint resolutions in 2003 that a significant amount of ***Colorado***'s entitlement remained undeveloped. [[303]](#footnote-304)303 Big Straw supporters argue ***Colorado*** should not leave more water than the compacts require in the ***river*** for downstream states while simultaneously imposing water restrictions on ***Colorado*** water users. [[304]](#footnote-305)304 With state decision-makers focused on water policy as a result of the drought, Big Straw proponents, such as State Commissioner of Agriculture Don Ament, saw an opportunity to "strike while the iron was hot," and fund the feasibility study. [[305]](#footnote-306)305 Supporters embrace the Big Straw as the answer to a common West Slope argument against new transbasin diversions - that West Slope interests lose the ability to use water arising on their side of the mountains simply because more people live east of the Divide. [[306]](#footnote-307)306

The General Assembly approved the feasibility study without indicating how a majority of members felt about the underlying project, or the many costs and technical hurdles the project would face. [[307]](#footnote-308)307 The CWCB subsequently hired a contractor to consider different scenarios for project size (250,000, 500,000, and 750,000 acre feet) and three different paths for the pump-back, all of which must start below the confluence of the Gunnison and ***Colorado*** ***Rivers*** in Grand Junction. [[308]](#footnote-309)308

No current water supplier has expressed any interest in building the project, even if it is feasible. This has led some to wonder whether the CWCB itself would consider building the project, particularly given the number of CWCB members who have voiced enthusiastic support for the project. [[309]](#footnote-310)309 Similarly, some wonder whether the Big Straw will appear in the preferred alternative list of the SWSI if the CWCB deems it feasible, regardless of whether there is an identified project proponent. [[310]](#footnote-311)310

**[\*87]**

d. Financing

At the request of the governor and with the full support of the CWCB and the Authority, the General Assembly adopted three measures expanding State financing for water projects. The first raised, from $ 100 million to $ 500 million, the cap on Authority funding not requiring legislative approval. [[311]](#footnote-312)311 The second, creating two billion dollars of bonding authority for the CWCB, was referred for a November 2003 statewide vote. [[312]](#footnote-313)312 Another, less dramatic measure authorizes the Authority to subsidize the cost of issuance of bonds and notes for the water projects it finances. [[313]](#footnote-314)313

i. The Authority: Bigger Projects, SWSI Tie-In and Local Assistance

While the Authority has always had as its mission the financing of water development projects, in 2003 the General Assembly increased its power by raising the total amount of bonding allowed for "small water resources projects" from $ 100 million to $ 500 million per project proponent, limited to governmental or quasi-governmental entities. [[314]](#footnote-315)314 The Authority funds "small water resources projects" without approval from the General Assembly, [[315]](#footnote-316)315 provided the projects meet the Authority's other rigorous criteria, such as those that banks and bond firms employ to ensure project viability. In addition, while the General Assembly deleted an out-dated statutory directive to fund three enormous water projects, [[316]](#footnote-317)316 it added a new directive to finance projects the CWCB identifies in the SWSI, provided the proponents seek Authority funding and the projects otherwise qualify under the Authority's general criteria. [[317]](#footnote-318)317

In a separate bill, the General Assembly also authorized the Authority to subsidize the cost of issuing bonds and notes for the water projects it finances. [[318]](#footnote-319)318 This would help prospective project proponents by providing State underwriting for the financial costs of building a new project.

ii. Referendum A: CWCB, State Revenue Bonds for Financing Water Projects

As part of Senate Bill 236, the General Assembly referred to the voters a provision that, had it been approved in the November 2003 statewide election, would have granted the CWCB authority to issue **[\*88]** state revenue bonds for water projects. [[319]](#footnote-320)319 Referendum A would have added, for the first time, a bonding mission to the CWCB's policy role. [[320]](#footnote-321)320 The tax-free bonds, in an amount up to $ 2 billion, would have been repaid with up to $ 4 billion in principal and interest derived from the bonded project's revenues, i.e., by project proponents selling water or power. [[321]](#footnote-322)321 Under the terms of Referendum A, the CWCB could also have issued bonds to build its own projects (e.g., a state water project) or bonded for projects of public-private partnerships. [[322]](#footnote-323)322 In this regard, the bonding authority would have been different from that of the Authority, which cannot bond either for a state agency or a private corporation. [[323]](#footnote-324)323

Another key aspect of Referendum A would have been that the CWCB would not just have been the financing agency; rather, the CWCB would have exercised unique power to "identify opportunities for water infrastructure projects and storage statewide and … recommend to the governor water infrastructure projects to be funded … through the issuance of [such bonds]." [[324]](#footnote-325)324 Thus, the CWCB would have both chosen and financed projects, creating a level of state influence that far exceeds the Authority's. Referendum A also established an ambitious timeline: it would have required the CWCB to recommend two projects in different ***river*** basins, with 2005 start dates, [[325]](#footnote-326)325 from which the governor was to have chosen one. [[326]](#footnote-327)326

Choosing and funding projects pursuant to Referendum A would have occurred without legislative oversight. [[327]](#footnote-328)327 The CWCB would only have submitted an annual report to the legislature about its activities; no legislative confirmation of the selected project, nor approval of the financing terms, would have occurred. [[328]](#footnote-329)328 Given that the referendum provided no timeframe either for the issuance of bonds or the terms for repayment, and no cap on interest rates other than the additional $ 2 billion allowed under the Referendum, the measure would have granted the CWCB significant leeway in fashioning deals.

Coupled with the SWSI, the Referendum A bonding authority **[\*89]** would have radically shifted power to the CWCB from traditional local water developers. The proponents of Referendum A understood this shift, as the governor stated in seeking support for the measure. [[329]](#footnote-330)329 Ultimately, ***Colorado*** voters rejected Referendum A by a two-to-one margin. [[330]](#footnote-331)330

D. Synthesis.

The State has historically played a minor role in developing ***Colorado***'s water resources. Certainly, the state engineer and the CWCB have been in the forefront of battles to protect ***Colorado***'s compact entitlements in interstate litigation, [[331]](#footnote-332)331 and to stop federal resource stewardship actions and policies from reducing the quantities of water available to ***Colorado*** water users - for example on the endangered species protection, [[332]](#footnote-333)332 reserved rights, [[333]](#footnote-334)333 and bypass flow fronts. [[334]](#footnote-335)334 Moreover, the CWCB, through its construction grants program, and the Authority, primarily through its revolving funds for water and wastewater treatment facilities, both have helped finance a wide variety of small projects. [[335]](#footnote-336)335

Still, ***Colorado*** has previously shied away from state water planning and has no State water projects. Neither water planning nor State projects are necessarily antithetical to the prior appropriation doctrine. Both the Texas and Wyoming legislatures directed state water plans in the last decade. [[336]](#footnote-337)336 And, California, of course, has the California Aqueduct, which is an impressive state water project, transferring water from the wetter north to dryer southern population centers. [[337]](#footnote-338)337 But, until 2003, the ***Colorado*** legislature has apparently been satisfied that the prior appropriation system itself, along with the constitutional protections for diversion to beneficial use, would suffice as ***Colorado***'s water plan [[338]](#footnote-339)338 while local and federal initiatives would provide ***Colorado***'s water projects. [[339]](#footnote-340)339

**[\*90]** With the drought as the backdrop, and at the behest of a state administration that, in virtually all other arenas, wants to cut taxes and downsize the government, the legislature's adoption of this slate of legislation transforming the State's role in water development is simply fascinating. At a time when the state budget is in crisis, the legislature has funded a massive state water planning effort. At a time when the state economy generally is struggling, the legislature has prescribed financing to underwrite a potentially massive public works program of new water projects. Interestingly, no major water supplier appears to have asked for this state effort, nor is there any new evidence that municipal water providers, who are the most active suppliers currently pursuing new water supplies, are in need of State assistance. The media is full of reports about new projects that these providers are developing without State assistance. [[340]](#footnote-341)340

So the questions are, "Why," "Why now," and "Will it last?" Certainly, this is not the first time that the legislature has opened the door to large-scale financing of water projects. In 1989, the General Assembly directed the Authority to finance not one but three huge, controversial water projects: Two Forks, Narrows, and Una. [[341]](#footnote-342)341 None was built. Second, most water suppliers and managers believe ***Colorado***'s most feasible projects have already been built. But, by consolidating planning, prioritizing, and financing authority in the CWCB, perhaps the legislature is signaling a more serious attempt to push state government into a role that previously only the Bureau has played in ***Colorado***. Thus, the CWCB ended the 2003 legislative session with immense authority to determine the focus of a statewide water study, to study the feasibility of massive transbasin diversions, and, had Referendum A passed, to have administered a massive new financing program for unidentified water infrastructure projects. Certainly if the SWSI produces a list of large projects for the Authority to finance, building and paying for those projects will last for decades beyond the drought of 2002.

**[\*91]**

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). CONCLUSION

As ***Colorado*** continues to grow, the Damocles' sword of semi-arid climate and cyclical drought remains pointed at the State's precious water resource. There is no evidence that the perceived water scarcity on the Front Range has any effect on the movement of people into the state. Moreover, many Coloradans, new and native, value the state's natural beauty, including its ***rivers***, for aesthetic, recreational and spiritual reasons. For this reason, managing ***Colorado***'s water resource to supply all needs, whether or not traditional, will remain a challenge.

What is interesting about the legislature's response to the 2002 drought was that, in many cases, the legislature turned to state agencies as the entities most able to "do something" about the problem, even as it slashed the state budget in response to a deficit every bit as dire as the drought. It gave the state engineer more power to determine material injury, and thereby quicken the pace of those water transfers most likely to help in drought situations. It also boosted the State's ability to finance new water development, as well as to engage in state planning that might identify those new water projects worthy of development. Areas of contention regarding water policy remain, including whether ***Colorado***'s system could use even more flexibility for transferring water, whether there is a way to encourage increased development without creating increased inequities between water rich and water short regions of the state, and what policies to encourage (or even require) increased water efficiency would mean. It will be interesting to watch and see whether the legislature continues to vest more power in the state agencies to solve ***Colorado***'s water future, or whether, decades from now, the 2003 legislative session will stand out as an anomaly in its aggrandizement of state agency power.

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1. 1 James N. Corbridge, Jr. & Teresa A. Rice, Vranesh's ***Colorado*** Water Law 1.2 (rev. ed. 1999). [↑](#footnote-ref-2)
2. 2 Nancy Lofholm, McInnis Rejects Governor's Water-Storage Pitch, Denver Post, July 24, 2003, at B3. [↑](#footnote-ref-3)
3. 3 Daniel F. Luecke et al., What the Current Drought Means for the Future of Water Management in ***Colorado*** 5 (2003), [*http://www.cotrout.org/DroughtReport/report1.03.htm*](http://www.cotrout.org/DroughtReport/report1.03.htm) (asserting the current drought is the most severe on record "by several measures", including current and multiple year streamflows). [↑](#footnote-ref-4)
4. 4 See generally H.R. 03-1001, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003); ***Colo.*** H.R. 03-1003; ***Colo.*** H.R. 03-1005; ***Colo.*** H.R. 03-1008; ***Colo.*** H.R. 03-1090; ***Colo.*** H.R. 03-1092; ***Colo.*** H.R. 03-1100; ***Colo.*** H.R. 03-1113; ***Colo.*** H.R. 03-1120; ***Colo.*** H.R. 03-1146; ***Colo.*** H.R. 03-1195; ***Colo.*** H.R. 03-1233; ***Colo.*** H.R. 03-1280; ***Colo.*** H.R. 03-1318; ***Colo.*** H.R. 03-1320; ***Colo.*** H.R. 03-1324; ***Colo.*** S. 03-045; ***Colo.*** S. 03-047; ***Colo.*** S. 03-073; ***Colo.*** S. 03-085; ***Colo.*** S. 03-087; ***Colo.*** S. 03-090; ***Colo.*** S. 03-110; ***Colo.*** S. 03-115; ***Colo.*** S. 03-126; ***Colo.*** S. 03-181; ***Colo.*** S. 03-236; ***Colo.*** S. 03-276; ***Colo.*** S. 03-278; ***Colo.*** S. 03-311; ***Colo.*** S. 03-313; ***Colo.*** S. 03-319; ***Colo.*** S. 03-346; ***Colo.*** H.R.J. Res. 03-1007; ***Colo.*** H.R.J. Res. 03-1008; ***Colo.*** H.R.J. Res. 03-1011; ***Colo.*** H.R.J. Res. 03-1015; ***Colo.*** H.R.J. Res. 03-1017; ***Colo.*** H.R.J. Res. 03-1019; ***Colo.*** H.R.J. Res. 03-1046; ***Colo.*** H.R.J. Res. 03-1048; S.J. Res. 03-007; H.R. Concurrent Res. 03-1009. [↑](#footnote-ref-5)
5. 5 See generally ***Colo.*** H.R. 03-1001 (codified as amended at [***Colo.*** *Rev. Stat. 37-95-109*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3HD-00000-00&context=1516831), 37-86-104, 37-87-101, 37-60-126, 37-92-308); ***Colo.*** S. 03-073 (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), 37-90-103, 37-92-103, 37-90-137, 37-92-305); ***Colo.*** H.R. 03-1318 (codified as amended at [***Colo.*** *Rev. Stat. 37-80.5-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36D-00000-00&context=1516831), -103, -104, -104.5, -105, -106); ***Colo.*** H.R. 03-1320 (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)); ***Colo.*** H.R. 03-1334 (codified at [***Colo.*** *Rev. Stat. 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)); ***Colo.*** S. 03-236 (adding [***Colo.*** *Rev. Stat. 37-60-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33N-00000-00&context=1516831), -210; [*amending 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831)[*7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831)-[*6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831)0-106, 37-95-103, -107, -107.5, 37-95-116). [↑](#footnote-ref-6)
6. 6 ***Colo.*** H.R.J. Res. 03-1015. [↑](#footnote-ref-7)
7. 71) All ***Colorado*** water users must share in solving ***Colorado***'s water resource problems.

   (2) The State of ***Colorado*** should provide assistance, when requested, for local water supply planning and assist in the implementation of consensus-based water resource solutions that respect local authorities, private property, and water rights.

   (3) During the process of planning to meet future needs, water suppliers and utilities should give preference to development of economically viable local water sources and demand management as they consider other options, including development of new water transfers.

   (4) Additional water storage should be pursued through the improvement and rehabilitation of existing structures and the development of new structures. These activities should be accomplished with local consensus.

   (5) The right of water rights owners to market their water rights must be protected in the following ways:

   (a) ***Colorado*** must fully explore flexible, market-based approaches to water supply management, including interruptible water contracts, water banking, in-state water leasing, and groundwater recharge management.

   (b) Those seeking to transfer agricultural water to another use should consider leasing or other temporary arrangements for transfer of water, rather than relying exclusively on the purchase of water rights. Leasing or other such temporary arrangements could allow for reversion of the water to agricultural purposes under certain conditions.

   (c) In the event that agricultural water is transferred, the transaction must adequately address the need for maintaining the existing tax base, protecting the remaining water rights in the area, and maintaining the proper stewardship of the land, including revegetation and weed control.

   (6) Appropriate recognition should be given to preservation of flows necessary to support recreational, hydroelectric, and environmental needs concurrent with development of water for beneficial consumptive uses.

   (7) Adverse economic, environmental, and social impacts of future water projects and water transfers should be minimized; unavoidable adverse impacts must be reasonably mitigated; all communities involved should commit themselves to identifying and implementing reasonable mitigation measures as an integral part of future water projects or transfers.

   (8) Future water supply solutions must benefit both the area of origin and the area of use.

   (9) Water conservation measures that do not injure other water rights should be aggressively pursued.

   (10) There must be an ongoing, concerted effort to educate all Coloradans on the importance of water, and the need to conserve, manage, and plan for the needs of this and future generations.

   ***Colo.*** H.R.J. Res. 03-1019. [↑](#footnote-ref-8)
8. 8 ***Colo.*** H.R.J. Res. 03-1048. [↑](#footnote-ref-9)
9. 9 ***Colo.*** S.J. Res. 03-007. [↑](#footnote-ref-10)
10. 10 ***Colo.*** H.R.J. Res. 03-1019. [↑](#footnote-ref-11)
11. 11 Judicial proceedings necessary to obtain a new water right or to change the use of an existing water right can range in length among water divisions from six months to two years or more. Telephone Interview by A. Lain Strawn with Stuart Corbridge, Judicial Clerk, Division One Water Court, Greeley, ***Colo.*** (Aug. 10, 2003). [↑](#footnote-ref-12)
12. 12 See generally ***Colo.*** H.R.J. Res. 03-1019. [↑](#footnote-ref-13)
13. 13 Arthur Kane, Owens Announces South Platte Well Deal, Touts Water Legislation, Denver Post, Feb. 16, 2003, at A1 (early edition). [↑](#footnote-ref-14)
14. 14 [***Colo.*** *Rev. Stat. 37-92-203*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FV-00000-00&context=1516831) (2002). [↑](#footnote-ref-15)
15. 15 See, e.g., ***Colo.*** H.R.J. Res. 03-1019 para. (5)(b) (The 2003 legislation embodies mechanisms to increase speed and overall efficiency of water administration especially in times of drought). [↑](#footnote-ref-16)
16. 16 See Charles F. Wilkinson, Crossing the Next Meridian: Land, Water, and the Future of the West 231, 241, 274 (1992). [↑](#footnote-ref-17)
17. 17 See S. 03-110, 64th Gen. Assem., 1st Reg. Sess., secs. 1, 14-15 (***Colo.*** 2003); S. 03-236, 64th Gen. Assem., 1st Reg. Sess., secs. 1, 4-6 (***Colo.*** 2003). [↑](#footnote-ref-18)
18. 18 ***Colo.*** Const. art. XVI, 5-6. [↑](#footnote-ref-19)
19. 19 Corbridge & Rice, supra note 1, 1.2, at 7, 8. [↑](#footnote-ref-20)
20. 20 [*6* ***Colo.*** *443, 447 (1882).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) The Left Hand Ditch Company built a ditch to irrigate crops some distance from the ***river***. Subsequently, George Coffin purchased land adjacent to the ***river*** and sought to use the water for irrigation. The court upheld the Ditch Company's superior claim to the water, thus choosing a prior appropriation system of water administration rather than a riparian system. [↑](#footnote-ref-21)
21. 21 [*Id. at 446.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-30P0-0040-03G0-00000-00&context=1516831) [↑](#footnote-ref-22)
22. 22 It is necessary to distinguish ownership of a water right from ownership of the water itself. The property right recognized by the court is not a right to the water itself, but rather a right to divert a decreed amount of water subject to a water user's priority. Title to the water is public, therefore the water user has a usufructuary right to the water. See ***Colo.*** Const. art. XVI, 5. [↑](#footnote-ref-23)
23. 23 See [*Aspen Wilderness Workshop, Inc. v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1263 (****Colo.*** *1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) (Mullarkey, J., dissenting) (***Colorado*** Supreme Court has never recognized the public trust doctrine with respect to water). [↑](#footnote-ref-24)
24. 24 Gregory J. Hobbs, Jr. & Bennett W. Raley, Water Rights Protection in Water Quality Law, 60 U. ***Colo.*** L. Rev. 841, 886 (1989). [↑](#footnote-ref-25)
25. 25 Act of Mar. 5, 1881, 1881 ***Colo.*** Sess. Laws 119. Administration of court ordered decrees was achieved by water commissioners in ***Colorado***'s seventy water districts. The commissioners had the authority to administer calls on the basis of priority dates, check headgates and maintain records of diversions. The state engineer also approved reservoir design safety and metering temporary exchanges. See ***Colo.*** Rev. Stat. 148-15-1 to -12 (1963); 37-87-105 (2002); 37-83-101 to -106 (1973). [↑](#footnote-ref-26)
26. 26 See Water Rights Determination and Administration Act of 1969, [***Colo.*** *Rev. Stat. 37-92-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FM-00000-00&context=1516831) to -602 (2002). [↑](#footnote-ref-27)
27. 27 ***Colorado*** State Engineer Hal Simpson, Keynote Address at the ***Colorado*** Bar Association's Retrospective of the Water Rights Determination and Administration Act of 1969 (Oct. 8, 2003). [↑](#footnote-ref-28)
28. 28 [***Colo.*** *Rev. Stat. 37-92-203*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FV-00000-00&context=1516831) (2002). [↑](#footnote-ref-29)
29. 29 See [*Fellhauer v. People, 447 P.2d 986, 994 (****Colo.*** *1969);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831) ***Colorado*** Water Rights Determination and Administration Act of 1969 (codified as [***Colo.*** *Rev. Stat. 37-92-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FM-00000-00&context=1516831) to -602); id. 37-92-501(2). [↑](#footnote-ref-30)
30. 30 [*Green v. Chaffee Ditch* ***Co****., 371 P.2d 775, 783 (****Colo.*** *1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WW20-0040-00SR-00000-00&context=1516831) ("material injury" and "injuriously affected" standards used interchangeably); [*City of* ***Colorado*** *Springs v. Yust, 249 P.2d 151, 154 (1952).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XHV0-0040-03SY-00000-00&context=1516831) [↑](#footnote-ref-31)
31. 31 ***Brighton Ditch Co. v. City of Englewood, 237 P.2d 116, 120 (Colo. 1951);*** see [*Fellhauer, 447 P.2d at 991 (****Colo.*** *1969).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831) [↑](#footnote-ref-32)
32. 32 [***Colo.*** *Rev. Stat. 37-92-305(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (2002). [↑](#footnote-ref-33)
33. 33 Id. 37-92-304(6). [↑](#footnote-ref-34)
34. 34 Telephone Interview by A. Lain Strawn with Stuart Corbridge, Judicial Clerk, Division One Water Court, Greeley, ***Colo.*** (Aug. 11, 2003). Rule 11 of the Uniform Local Rules for All State Water Court Divisions provides general guidelines once an application is filed, providing that a case is "at issue" ninety days after either the entry of order of re-referral, or a filing of protest to a ruling of the referee, whichever is earlier, unless the water court directs otherwise. Unif. Local R. for All State Water Ct. Divs. 11, para. (a). If the water court directs otherwise, the time-period for filing a proposed Case Management Order shall be no later than 75 days after a case is at issue. Id. at para. (b). The timeframes established by the Case Management Order are highly variable with no recommendations provided by the water court. The Order contains the trial date, the disclosure and discovery schedule as agreed upon by the parties, the time-frame for identifying persons, documents, and tangible things, joining additional parties, amending pleadings, making pre-trial motions, and discussing settlements. [↑](#footnote-ref-35)
35. 35 Telephone Interview, Corbridge, supra note 34. For example, no time limitation applies to cases that return to the water judge for resolution either because a party sought re-referral or protested the referee's ruling. [↑](#footnote-ref-36)
36. 36 See generally 1881 ***Colo.*** Sess. Laws 120-22 (enumerating engineer's duties upon creation of the position); ***Colo.*** Rev. Stat. 147-11-1 to -21 (1953) (enumerating duties as of 1953). [↑](#footnote-ref-37)
37. 37 ***Colo.*** Rev. Stat. 147-11-3 (1953). [↑](#footnote-ref-38)
38. 38 Id. 147-6-5 (1953). [↑](#footnote-ref-39)
39. 39 Act of May 3, 1965, ch. 318, 1965 ***Colo.*** Sess. Laws 1244. Attempts to administer non-tributary groundwater also appeared during this time, but due to its unique status both hydrologically and legally, it is beyond the scope of this article; the water court's determination entitling junior appropriators to historic return flows also expanded the role of the state engineer. See [*Fort Lyon Canal* ***Co****. v. Chew, 81 P. 37, 41 (****Colo.*** *1905);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-25K0-0040-004R-00000-00&context=1516831) [*Enlarged Southside Irrigation Ditch* ***Co****. v. John's Flood Ditch* ***Co****., 183 P.2d 552, 554 (****Colo.*** *1947);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XSW0-0040-04W2-00000-00&context=1516831) ***Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 632 (Colo. 1954).*** [↑](#footnote-ref-40)
40. 40 See generally Water Right Determination and Administration Act of 1969, ch. 373, 1969 ***Colo.*** Sess. Laws 1200; [***Colo.*** *Rev. Stat. 37-92-306*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G4-00000-00&context=1516831), -401(1)(b)(VI), 37-90-137 (2002). [↑](#footnote-ref-41)
41. 41 [***Colo.*** *Rev. Stat. 37-90-137*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SN93-GXF6-81VM-00000-00&context=1516831), 37-92-305(6) (2002). [↑](#footnote-ref-42)
42. 42 Id. 37-92-401(1)(a), (6), (7). [↑](#footnote-ref-43)
43. 43Id. 37-92-501. [↑](#footnote-ref-44)
44. 44 H.R. 03-1318, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003). [↑](#footnote-ref-45)
45. 45 ***Colo.*** H.R. 03-1320. [↑](#footnote-ref-46)
46. 46 ***Colo.*** H.R. 03-1334. [↑](#footnote-ref-47)
47. 47 ***Colo.*** S. 03-073; ***Colo.*** H.R. 03-1001. [↑](#footnote-ref-48)
48. 48 ***Colo.*** H.R. 03-1318. [↑](#footnote-ref-49)
49. 49 Lawrence J. MacDonnell et al., Water Banks in the West 1-4 (1994). [↑](#footnote-ref-50)
50. 50 ***Colo.*** H.R. 03-1318. [↑](#footnote-ref-51)
51. 51 See id. at sec. 4 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831)). [↑](#footnote-ref-52)
52. 52 See Kevin B. Pratt, Water Banking: A New Tool for Water Management, 23 ***Colo.*** Law. 595, 595 (1994). [↑](#footnote-ref-53)
53. 53 Id. [↑](#footnote-ref-54)
54. 54 ***Colo.*** H.R. 03-1318, sec. 4 (codified at 37-80.5-104.5(1)(d)). [↑](#footnote-ref-55)
55. 55 Id.; see infra Section II.B. for a discussion of local water districts. [↑](#footnote-ref-56)
56. 56 ***Colo.*** H.R. 03-1318, sec. 4. [↑](#footnote-ref-57)
57. 57 ***Colo.*** H.R. 03-1318. [↑](#footnote-ref-58)
58. 58 See Telephone Interview by A. Lain Strawn with Dennis Miller, Operational Coordinator, Northern ***Colorado*** Water Conservancy District (Aug. 8, 2003). [↑](#footnote-ref-59)
59. 59 Id. [↑](#footnote-ref-60)
60. 60 Id. [↑](#footnote-ref-61)
61. 61 Id. [↑](#footnote-ref-62)
62. 62 See id. Permanent transfers are also permitted but have different procedural mechanisms and must be approved by Northern's Board of Directors. [↑](#footnote-ref-63)
63. 63 Act of Apr. 6, 1899, ch. 105, 1899 ***Colo.*** Sess. Laws 236. [↑](#footnote-ref-64)
64. 64 Arkansas ***River*** Pilot Water Banking Act, H.R. 01-1354, 63d Gen. Assem., 1st Reg. Sess. (***Colo.*** 2001). [↑](#footnote-ref-65)
65. 65 See id. sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831)). [↑](#footnote-ref-66)
66. 66 Id. [↑](#footnote-ref-67)
67. 67 Id. sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104(1)(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831)). [↑](#footnote-ref-68)
68. 68 See supra note 65 and accompanying text. [↑](#footnote-ref-69)
69. 69 ***Colo.*** H.R. 01-1354, sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104(1)(a)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831)). [↑](#footnote-ref-70)
70. 70 Id. (codified at [***Colo.*** *Rev. Stat. 37-80.5-104(1)(c)(IV)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831)). [↑](#footnote-ref-71)
71. 71 See Rules Governing the Arkansas ***River*** Water Bank Pilot Program, [*2* ***Colo.*** *Code Regs. 402-12*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G225-00009-00&context=1516831), Rule 4(J) (2002); see also [***Colo.*** *Rev. Stat. 37-80.5-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831) (2002). [↑](#footnote-ref-72)
72. 72 [*2* ***Colo.*** *Code Reg. 402-12*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G225-00009-00&context=1516831) (2002). [↑](#footnote-ref-73)
73. 73 See Arkansas ***River*** Water Bank Program, Southeastern ***Colo.*** Water Conservancy Dist., at [*http://www.coloradowaterbank.org/*](http://www.coloradowaterbank.org/) (last visited Jan. 3, 2004). [↑](#footnote-ref-74)
74. 74 In April 2003, the online database for the Arkansas ***River*** Water Bank listed two deposits. Apparently, there has been no subsequent activity. See Water Listings, Southeastern ***Colo.*** Water Conservancy Dist., at [*https://www.coloradowaterbank.org/listingsonline/AllListings.asp*](https://www.coloradowaterbank.org/listingsonline/AllListings.asp) (last visited Jan. 3, 2004) (bank lists only one deposit as of October 5, 2003). [↑](#footnote-ref-75)
75. 75 H.R. 03-1318, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003). [↑](#footnote-ref-76)
76. 76 Compare [***Colo.*** *Rev. Stat. 37-80.5-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831) (2002) and [*2* ***Colo.*** *Code Reg. 402-12*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5XSH-9F01-DXHD-G225-00009-00&context=1516831) (2002), with ***Colo.*** H.R. 03-1318, sec. 4. [↑](#footnote-ref-77)
77. 77 ***Colo.*** H.R. 03-1318, sec. 4 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831)). [↑](#footnote-ref-78)
78. 78 Id. sec. 5 (codified as amended at [***Colo.*** *Rev. Stat. 37-80.5-105*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36J-00000-00&context=1516831)). [↑](#footnote-ref-79)
79. 79 See [***Colo.*** *Rev. Stat. 37-80.5-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36G-00000-00&context=1516831) (2002); ***Colo.*** H.R. 03-1318, sec. 4 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831)). [↑](#footnote-ref-80)
80. 80 ***Colo.*** H.R. 03-1318, secs. 1, 4. [↑](#footnote-ref-81)
81. 81 The only limitation in H.R. 1318 is the state engineer may not permit a loan from the bank for instream flow use, unless such a transfer is to the CWCB. Id. sec. 4. This is consistent with general ***Colorado*** water law limiting instream flows. [↑](#footnote-ref-82)
82. 82 See, e.g., ***Colo.*** H.R. 03-1320. [↑](#footnote-ref-83)
83. 83 See ***Colo.*** H.R. 03-1318, sec. 4 (codified at [***Colo.*** *Rev. Stat. 37-80.5-104.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J36H-00000-00&context=1516831)). [↑](#footnote-ref-84)
84. 84 ***Colo.*** H.R. 03-1320, sec. 1 (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)). [↑](#footnote-ref-85)
85. 85 Id. [↑](#footnote-ref-86)
86. 86 Id. [↑](#footnote-ref-87)
87. 87 Act of Apr. 6, 1899, ch. 105, 1899 ***Colo.*** Sess. Laws 235. [↑](#footnote-ref-88)
88. 88 Compare id., with ***Colo.*** H.R. 03-1320. [↑](#footnote-ref-89)
89. 89 Act of Apr. 6, 1899, 3. For instance, water released from a downstream reservoir is exchanged for water diverted above the reservoir. The ***Colorado*** Supreme Court placed a "no injury" construction upon the statute in 1905. [*Ft. Lyon Canal* ***Co****. v. Chew, 81 P. 37, 40 (1905);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-25K0-0040-004R-00000-00&context=1516831) see also [*Bowman v. Virdin, 90 P. 506, 507 (1907)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-21T0-0040-04PM-00000-00&context=1516831) (pointing to the no injury construction from Chew). [↑](#footnote-ref-90)
90. 90 See Allyn Harvey, Rippy's Stream-Flow Bill Could Help ***Rivers*** In Need, Aspen Times, Mar. 11, 2003, [*http://www.aspentimes.com/apps/pbcs.dll/frontpage*](http://www.aspentimes.com/apps/pbcs.dll/frontpage). [↑](#footnote-ref-91)
91. 91 Id.; Janet Urquhart, Roaring Fork ***River*** Silenced, Aspen Times, Aug. 20, 2002, at A1. [↑](#footnote-ref-92)
92. 92 Jeanne M. Beaudry & Kristine Crandall, Roaring Fork Conservancy, Letter to Gov. Bill Owens and Department of Natural Resources Director Greg Walcher, Refine Our Water Policies, Aspen Times, Oct. 2, 2002, at 9. [↑](#footnote-ref-93)
93. 93 Id. [↑](#footnote-ref-94)
94. 94 Id. [↑](#footnote-ref-95)
95. 95 Harvey, supra note 90; H.R. 03-1320, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003). [↑](#footnote-ref-96)
96. 96 See Harvey, supra note 90. [↑](#footnote-ref-97)
97. 97 ***Colo.*** H.R. 03-1320, sec. 1. [↑](#footnote-ref-98)
98. 98 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831), (V)). [↑](#footnote-ref-99)
99. 99 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)). [↑](#footnote-ref-100)
100. 100 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)(VIII)). [↑](#footnote-ref-101)
101. 101 See id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)). [↑](#footnote-ref-102)
102. 102 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)(VII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)). [↑](#footnote-ref-103)
103. 103 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)(2(a)). [↑](#footnote-ref-104)
104. 104 See infra Section II. [↑](#footnote-ref-105)
105. 105 H.R. 03-1334, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003) (codified at [***Colo.*** *Rev. Stat. 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-106)
106. 106 See Nat'l Research Council, Comm. on Western Water Mgmt., Water Transfers in the West: Efficiency, Equity, and the Environment 32 (1992). [↑](#footnote-ref-107)
107. 107 ***Colo.*** H.R. 03-1334, sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-108)
108. 108 See, e.g., Hydrosphere Resource Consultants et al., Metropolitan Water Supply Investigation Final Report 96 (Jan. 1999). [↑](#footnote-ref-109)
109. 109 Id. [↑](#footnote-ref-110)
110. 110 Id. [↑](#footnote-ref-111)
111. 111 The bill does not require adjudication before the state engineer may approve an IWSA. See ***Colo.*** H.R. 03-1334, sec. 1 (***Colo.*** 2003) (codified at [***Colo.*** *Rev. Stat. 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-112)
112. 112 H.R. 02-1414, 63d Gen. Assem., 1st Reg. Sess. (***Colo.*** 2002) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-113)
113. 113 Id. [↑](#footnote-ref-114)
114. 114 Id. [↑](#footnote-ref-115)
115. 115 See Hydrosphere Resource Consultants et al., supra note 108, at 102. [↑](#footnote-ref-116)
116. 116 See id. at 107. [↑](#footnote-ref-117)
117. 117 Id. [↑](#footnote-ref-118)
118. 118 H.R. 03-1334, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (codified at [***Colo.*** *Rev. Stat. 37-92-309*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-119)
119. 119 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)-(b)). [↑](#footnote-ref-120)
120. 120 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831), (3)). [↑](#footnote-ref-121)
121. 121 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831) (2003)). [↑](#footnote-ref-122)
122. 122 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)(c)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)-(II) (2003)). [↑](#footnote-ref-123)
123. 123 See ***Colo.*** H.R. 03-1320, sec. 1 (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)); ***Colo.*** H.R. 03-1334, sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-124)
124. 124 ***Colo.*** H.R. 03-1334, sec. 1 (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-125)
125. 125 Id. [↑](#footnote-ref-126)
126. 126 Id. [↑](#footnote-ref-127)
127. 127 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(3)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-128)
128. 128 Id. [↑](#footnote-ref-129)
129. 129 Id. (codified at [***Colo.*** *Rev. Stat. 37-92-309(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G8-00000-00&context=1516831)). [↑](#footnote-ref-130)
130. 130 See, e.g., [*Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1144 (****Colo.*** *2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44PW-3160-0039-4363-00000-00&context=1516831) [↑](#footnote-ref-131)
131. 131 As long as adequate replacement water is put into the affected stream system. [↑](#footnote-ref-132)
132. 132 [***Colo.*** *Rev. Stat. 37-80-120(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J365-00000-00&context=1516831) (2002). [↑](#footnote-ref-133)
133. 133 Id. [↑](#footnote-ref-134)
134. 134 Id. [↑](#footnote-ref-135)
135. 135 Id. 37-80-120(3). [↑](#footnote-ref-136)
136. 136 Id. 37-80-120(2). [↑](#footnote-ref-137)
137. 137 See, e.g., [*Empire Lodge, 39 P.3d at 1144-45.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44PW-3160-0039-4363-00000-00&context=1516831) [↑](#footnote-ref-138)
138. 138 See, e.g., id. [↑](#footnote-ref-139)
139. 139 See [*Simpson v. Bijou Irrigation* ***Co****., 69 P.3d 50 (****Colo.*** *2003).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48GW-CRR0-0039-44HJ-00000-00&context=1516831) Senior water users were encouraged by the 2001 Supreme Court decision striking down SSPs in the Arkansas ***River*** Valley (and by extension the South Platte ***River*** Basin). [*Empire Lodge, 39 P.3d 1139.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44PW-3160-0039-4363-00000-00&context=1516831) In 2002, in response to the court's decision in Empire Lodge, the legislature directed the state engineer to issue rules to allow well users who had historically relied on SSPs in the South Platte ***River*** Basin to continue to irrigate. [***Colo.*** *Rev. Stat. 37-92-308(1)(c)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2002). For further analysis of the recent issues plaguing water users in the South Platte ***River*** Basin, see A. Lain Strawn, The Last GASP: Current Conflict Over Management of Replacement Water in the South Platte ***River*** Basin, 75 U. ***Colo.*** L. Rev. (forthcoming May 2004). [↑](#footnote-ref-140)
140. 140 See Mike Shimmin, Recent Developments Concerning State Engineer Rulemaking Authority for the South Platte ***River*** Basin, [*6 U. Denv. Water L. Rev. 549, 552-53 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4992-DTD0-00SW-50KD-00000-00&context=1516831) [↑](#footnote-ref-141)
141. 141 See Theo Stein, Bill Targets Irrigation Wells, Denver Post, Feb. 5, 2003, at B1; see also Theo Stein, Options Drying Up for Well Users on South Platte, Denver Post, Jan. 31, 2003, at B4. [↑](#footnote-ref-142)
142. 142 S. 03-073, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(1)(c)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (3)(a)); Timothy R. Buchanan, Doing the Right Thing, Brush News Tribune, Jan. 22, 2003, at 15, available at [*http://www.brushnewstribune.com*](http://www.brushnewstribune.com). [↑](#footnote-ref-143)
143. 143 H.R. 03-1001, 64th Gen. Assem., 1st Reg. Sess., sec. 2 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-144)
144. 144 S. 03-073, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(3)(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)-(IV)). [↑](#footnote-ref-145)
145. 145 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(3)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-146)
146. 146 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(3)(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-147)
147. 147 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(3)(c)(VII)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-148)
148. 148 H.R. 1001, 64th Gen. Assem., 1st Reg. Sess., sec. 5 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-149)
149. 149 Telephone Interview by A. Lain Strawn with Dave Nettles, Division One Engineer, Water Division One (Aug. 14, 2003). [↑](#footnote-ref-150)
150. 150 ***Colo.*** H.R. 03-1001, sec. 5 (codified at [***Colo.*** *Rev. Stat. 37-92-308(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-151)
151. 151 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(4)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-152)
152. 152 Id. (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(4)(a)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-153)
153. 153 Id. [↑](#footnote-ref-154)
154. 154 Id. (codified as amended at 37-92-308(4)(b)). [↑](#footnote-ref-155)
155. 155 S. 03-073, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-308(3)(c)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831)). [↑](#footnote-ref-156)
156. 156 Melinda Kassen, A Critical Analysis of ***Colorado***'s Water Right Determination and Administration Act of 1969, [*3 U. Denv. Water. L. Rev. 58, 58-59 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TV-00000-00&context=1516831) [↑](#footnote-ref-157)
157. 157 Corbridge & Rice, supra note 1, 1.2, at 3. [↑](#footnote-ref-158)
158. 158 See id., 5.1, at 277. [↑](#footnote-ref-159)
159. 159 Telephone Interview by A. Lain Strawn with Dave Nettles, Division Engineer, Water Division One (Oct. 10, 2003). [↑](#footnote-ref-160)
160. 160 See, e.g., La Plata ***River*** Compact, [***Colo.*** *Rev. Stat. 37-63-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J346-00000-00&context=1516831) to -102 (2002); ***Colorado*** ***River*** Compact, [***Colo.*** *Rev. Stat. 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831) to -104 (2002); [*Kansas v.* ***Colorado****, 185 U.S. 125 (1902);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CF60-003B-H50Y-00000-00&context=1516831) [*Wyoming v.* ***Colorado****, 259 U.S. 419 (1922),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831) modified, [*260 U.S. 1 (1922).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45K0-003B-H29M-00000-00&context=1516831) [↑](#footnote-ref-161)
161. 161 See David H. Getches, The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?, [*20 Stan. Envtl. L.J. 3, 11-12, 52-53, 55-58 (2001).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4293-04G0-00CT-V0TW-00000-00&context=1516831) [↑](#footnote-ref-162)
162. 162 See id. [↑](#footnote-ref-163)
163. 163 See S. 03-236, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-60-106*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J31V-00000-00&context=1516831), 37-95-103, -106, -107, -107.5, -116). [↑](#footnote-ref-164)
164. 164 David H. Getches, Water Law in a Nutshell 371 (3d. ed. 1997). [↑](#footnote-ref-165)
165. 165 See Wilkinson, supra note 16, at 12. [↑](#footnote-ref-166)
166. 166 See John R. Mather, Water Resources: Distribution, Use, and Management 297-98 (1984). [↑](#footnote-ref-167)
167. 167 See U.S. Dep't of Interior, Assessment "87: A New Direction for the Bureau of Reclamation i-ii, 1-2 (1987) [hereinafter Assessment "87]; see also U.S. Dep't of Interior, Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior (1988) [hereinafter 1988 Principles], reprinted in A. Dan Tarlock et al., Water Resource Management: A Casebook in Law and Public Policy (5th ed. 2002), at 825-27. [↑](#footnote-ref-168)
168. 168 Reclamation Act, [*43 U.S.C. 391*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-7397-00000-00&context=1516831) (2000). [↑](#footnote-ref-169)
169. 169 Tarlock, supra note 167, at 817. [↑](#footnote-ref-170)
170. 170 [*43 U.S.C. 391*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-7397-00000-00&context=1516831) (2000). [↑](#footnote-ref-171)
171. 171 Id. [↑](#footnote-ref-172)
172. 172 As Congress became aware that money from crop revenues was insufficient to repay project costs, Congress amended the 1902 Act to allow for other uses such as hydropower for growing cities. Compare Boulder Canyon Act, [*43 U.S.C. 617*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73R7-00000-00&context=1516831) (1929), with Boulder Canyon Act, [*43 U.S.C. 617*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73R7-00000-00&context=1516831) (2000). Much of the hydropower generated by the Reclamation projects, however, is used to pump irrigation water to project beneficiaries, rather than being sold more profitably to cities. Tarlock, supra note 167, at 824. [↑](#footnote-ref-173)
173. 173 See, e.g., [*43 U.S.C. 383*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-7355-00000-00&context=1516831) (2000). [↑](#footnote-ref-174)
174. 174 See [*43 U.S.C. 390ee*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-738C-00000-00&context=1516831)(c) (2000). [↑](#footnote-ref-175)
175. 175 For information on some of the Bureau's larger projects in ***Colorado***, see Bureau of Reclamation, U.S. Dep't of Interior, Dams, Projects & Powerplants: Uncompahgre Project, [*http://www.usbr.gov/dataweb/html/uncomp.html*](http://www.usbr.gov/dataweb/html/uncomp.html) (last visited Dec. 15, 2003) [hereinafter Uncompahgre Project]; Bureau of Reclamation, U.S. Dep't of Interior, Dams, Projects & Powerplants: ***Colorado*** Big-Thompson Project (1996), [*http://www.usbr.gov/dataweb/html/cbt1.html*](http://www.usbr.gov/dataweb/html/cbt1.html) (last visited Dec. 15, 2003); Northern ***Colo.*** Water Conservancy Dist., ***Colorado*** Big-Thompson Project, [*http://www.ncwcd.org/project&features/cbt*](http://www.ncwcd.org/project&features/cbt) main.asp (last visited Dec. 15, 2003); Bureau of Reclamation, U.S. Dep't of Interior, Dams, Projects & Powerplants: ***Colorado*** ***River*** Storage Project ("CRSP"), Aspinall Unit: Blue Mesa Dam, Morrow Point Reservoir, and Crystal Reservoir, [*http://www.usbr.gov/dataweb/html/crsp.html*](http://www.usbr.gov/dataweb/html/crsp.html) (last visited Dec. 15, 2003); Southeastern ***Colo.*** Water Conservancy Dist., History & Description of the Fryingpan-Arkansas Project, [*http://www.secwcd.org/History%20and%20Description.htm*](http://www.secwcd.org/History%20and%20Description.htm) (last visited Dec. 15, 2003); Bureau of Reclamation, U.S. Dep't of Interior, Dams, Projects & Powerplants: Dolores Project, [*http://www.usbr.gov/dataweb/html/Dolores.html*](http://www.usbr.gov/dataweb/html/Dolores.html) (last visited Dec. 15, 2003); Bureau of Reclamation, U.S. Dep't of Interior, Animas-LaPlata Project, [*http://www.usbr.gov/uc/progact/animas/overview.html*](http://www.usbr.gov/uc/progact/animas/overview.html) (last visited Dec. 15, 2003). [↑](#footnote-ref-176)
176. 176 Frederick Merk, History of the Westward Movement 509-510, 512 (1978). [↑](#footnote-ref-177)
177. 177 Id. at 511. [↑](#footnote-ref-178)
178. 178 Id. At the time of Merk's writing, costs were $ 15-20 for private projects and $ 43-162 for Bureau projects per acre of irrigated land. Id. [↑](#footnote-ref-179)
179. 179 Richard W. Wahl, Markets for Federal Water: Subsidies, Property Rights, and the Bureau of Reclamation 27-46 (1989). [↑](#footnote-ref-180)
180. 180 See U.S. Dep't of Interior, Water 2025: Preventing Crises and Conflict in the West 2-3, 11 (2003), [*www.doi.gov/water2025/ppt/html*](http://www.doi.gov/water2025/ppt/html) (last visited Dec. 15, 2003) [hereinafter Water 2025]. [↑](#footnote-ref-181)
181. 181 Getches, supra note 161, at 16-17. [↑](#footnote-ref-182)
182. 182 Christine A. Klein, On Dams and Democracy, [*78 Or. L. Rev. 641, 700-01 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4079-0BG0-00CW-C0JN-00000-00&context=1516831) [↑](#footnote-ref-183)
183. 183 See Marc Reisner, Cadillac Desert: The American West and Its Disappearing Water 318-19 (rev. ed. 1993); see also Richard D. Lamm & Michael McCarthy, The Angry West: A Vulnerable Land and Its Future 197-98 (1982). [↑](#footnote-ref-184)
184. 184 Lamm & McCarthy, supra note 183, at 202. [↑](#footnote-ref-185)
185. 185 A. Dan Tarlock & Sarah B. Van de Wetering, Growth Management and Western Water Law: From Urban Oases to Archipelagos, 5 Hastings W.-Nw. J. Envtl. L. & Pol'y 163, 170 n.42 (1999). [↑](#footnote-ref-186)
186. 186 See Klein, supra note 182, at 702. [↑](#footnote-ref-187)
187. 187 See Assessment "87, supra note 167, at i-ii, 1-2, 8, 10-11. [↑](#footnote-ref-188)
188. 188 Id. at 1. [↑](#footnote-ref-189)
189. 189 1988 Principles, supra note 167, reprinted in Tarlock, supra note 167, at 825. [↑](#footnote-ref-190)
190. 190 1. Primacy in water allocation and management decisions rests principally with the States. Voluntary water transactions under this policy must be in accordance with applicable State and Federal laws.

     2. The Department of the Interior (DOI) will become involved in facilitating a proposed voluntary water transaction only when it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources, and when:

     (a) there is an existing Federal contractual or other legal obligation associated with the water supply; or

     (b) there is an existing water right held by the Federal government that may be affected by the transaction; or

     (c) it is proposed to use Federally-owned storage or conveyance capacity to facilitate the transaction; or

     (d) the proposed transaction will affect Federal project operations; and

     (e) the appropriate State, Tribal or other non-Federal political authorities or subdivisions request DOI's active involvement.

     3. DOI will participate in or approve transactions when there are no adverse third-party consequences, or when such third-party consequences will be heard and adjudicated in appropriate State forums, or when such consequences will be mitigated to the satisfaction of the affected parties.

     4. As a general rule, DOI's role will be to facilitate transactions that are in accordance with applicable State and Federal law and proposed by others. In doing so, DOI will consider the positions of the affected State, Tribal and local authorities. DOI will not suggest a specific transaction except when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply the provision of which otherwise would involve expenditures of Federal funds. Such a suggestion would not be carried out without the concurrence of all the affected non-Federal parties.

     5. The fact that the transaction may involve the use of water supplies developed by Federal water resources projects shall not be considered during evaluation of a proposed transaction.

     6. One of DOI's objectives will be to ensure that the Federal government is in an acceptable financial, operational and contractual position following accomplishment of a transaction under this policy. Unless required explicitly by existing law, contracts, or regulations, DOI will refrain from burdening the transaction with additional costs, fees, or charges, except for those costs actually incurred by DOI in performance of its functions in a particular transaction.

     7. DOI will consider, in cooperation with appropriate State, Tribal and local authorities, necessary measures that may be required to mitigate any adverse environmental effects that may arise as a result of the proposed transaction.

     Id. at 826-27. [↑](#footnote-ref-191)
191. 191 See Daniel P. Beard, Bureau of Reclamation, Blueprint for Reform: The Commissioner's Plan for Reinventing Reclamation 1-2 (1993). [↑](#footnote-ref-192)
192. 192 Daniel P. Beard, Remarks Before the International Commission on Large Dams 7 (Nov. 9, 1994) (transcript on file with the University of Denver Water Law Review). [↑](#footnote-ref-193)
193. 193 See [*Water 2025, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 180, at 2-11. [↑](#footnote-ref-194)
194. 194 Id. at 3, 14-18. [↑](#footnote-ref-195)
195. 195 See, e.g., [*Oppenlander v. Left Hand Ditch* ***Co****., 31 P. 854 (1892)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2KD0-0040-0202-00000-00&context=1516831) (holding that the right to use water can be merged into one's rights as owner and stockholder of a ditch company, thereby encouraging water users to join ditch companies to facilitate rapid water development). [↑](#footnote-ref-196)
196. 196 For example, the City of Denver participates in an Interruptible Water Supply Arrangement with agriculture. See Hydrosphere Resource Consultants, supra note 108, at 89. [↑](#footnote-ref-197)
197. 197 See Corbridge & Rice, supra note 1, 5.1, at 277. [↑](#footnote-ref-198)
198. 198 Joint ditch companies hold the ditch, its right-of-way, and the responsibilities for structural maintenance or expansion in ***co***-tenancy, allowing individual water users along the ditch to monitor one another and prevent material injury without outside administration. Each tenant is the owner of an individual interest in the entire estate. Therefore, upon the death of a ***co***-tenant his or her property interest passes to the heirs not the surviving ***co***-tenants. See Roger Cunningham et al., The Law of Real Property 5.2 (2d ed. 1993); Corbridge & Rice, supra note 1, 5.2, at 278-79. [↑](#footnote-ref-199)
199. 199Mutual ditch companies are analogous to a private corporation, but distribute water instead of profits to shareholders. See generally [***Colo.*** *Rev. Stat. 7-42-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HD33-CH1B-T0HC-00000-00&context=1516831) to -107. Mutual ditch companies charge shareholders for the continued operation and maintenance of a company's ditches and reservoirs. Id. 7-42-104. Stock goes to shareholders based on the amount of land each shareholder irrigates. Corbridge & Rice, supra note 1, 5.3, at 284-85. [↑](#footnote-ref-200)
200. 200 Carrier ditch companies do not own water rights themselves, but rather supply a ditch with water from the stream so the water rights holders can more economically obtain their water. Corbridge & Rice, supra note 1, 5.4, at 292. Therefore, the carrier ditch seeks a profitable return on its investment. Id.; see also [*City & County of Denver v. Miller, 368 P.2d 982, 984 (1962).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WWN0-0040-00X5-00000-00&context=1516831) [↑](#footnote-ref-201)
201. 201 Corbridge & Rice, supra note 1, 5.2, at 278-79. [↑](#footnote-ref-202)
202. 202 Michael Holleran, Boulder Valley Ditches: Farmer's Ditch A History and Guide, at [*http://thunder1.cudenver.edu/aandP/people/folders/holleran/Fa*](http://thunder1.cudenver.edu/aandP/people/folders/holleran/Fa) rmers.html (last visited Dec. 15, 2003). [↑](#footnote-ref-203)
203. 203 Id. [↑](#footnote-ref-204)
204. 204 Id. [↑](#footnote-ref-205)
205. 205 Boulder & White Rock Ditch & Reservoir Company Workshop, June 12, 2003 (on file with the author). [↑](#footnote-ref-206)
206. 206 Id. [↑](#footnote-ref-207)
207. 207 Id. [↑](#footnote-ref-208)
208. 208 Id. [↑](#footnote-ref-209)
209. 209 Id. [↑](#footnote-ref-210)
210. 210 Conservation districts differ from conservancy district because they are created by legislative action. Corbridge & Rice, supra note 1, 5.7, at 313. ***Colorado*** currently has three conservation districts: the ***Colorado*** ***River*** Water Conservation District, Southwestern Water Conservation District, and Rio Grande Water Conservation District, which plan for growth and develop ***Colorado***'s compact entitlements and apportioned shares of interstate ***rivers***. See [***Colo.*** *Rev. Stat. 37-46-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2PH-00000-00&context=1516831), -47-101, -48-101 (2002). [↑](#footnote-ref-211)
211. 211 While these districts have the authority to both acquire property (including water) and build projects, historically, they have not engaged in their own water development; rather, they help conservancy districts and the Bureau fund and construct their projects. Corbridge & Rice, supra note 1, 5.7, at 317. [↑](#footnote-ref-212)
212. 212 Fighting for Green Mountain was actually the reason for the ***River*** District's creation. See About the ***Colorado*** ***River*** District, ***Colo.*** ***River*** Water Conservation Dist., at [*http://www.crwcd.org/whoweare.html*](http://www.crwcd.org/whoweare.html) (last visited Feb. 8, 2004). [↑](#footnote-ref-213)
213. 213 See The History of Southwestern Water Conservation District, Water Info. Program, [*http://www.waterinfo.org/history.html*](http://www.waterinfo.org/history.html) (last visited Feb. 8, 2004). [↑](#footnote-ref-214)
214. 214 See Wolford Mountain Fact Sheet, ***Colo.*** ***River*** Water Conservation Dist., at [*http://www.crwcd.org/wolford/factsheet.html*](http://www.crwcd.org/wolford/factsheet.html) (last visited Feb. 8, 2004); Wolford Mountain History and Current Operations, ***Colo.*** ***River*** Water Conservation Dist., at [*http://www.crwcd.org/wolford/history.html*](http://www.crwcd.org/wolford/history.html) (last visited Feb. 8, 2004). [↑](#footnote-ref-215)
215. 215 Irrigation districts own privately held property but are quasi-governmental in that they have the power to levy ad valorem taxes. [***Colo.*** *Rev. Stat. 37-43-132*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2G0-00000-00&context=1516831) to -136 (2002). In situations where a district is the beneficiary of a large-scale federal project, the project's infrastructure can be expensive. For example, some of the Uncompahgre Valley Water User's Association is the beneficiary of water supplied by the Gunnison Tunnel, a major feature of the Bureau of Reclamation's Uncompahgre Project. See Uncompahgre Project, supra note 175. In most other cases, the small number of project beneficiaries limits irrigation to small water projects. See Corbridge & Rice, supra note 1, 5.5, at 295. [↑](#footnote-ref-216)
216. 216 Conservancy districts encompass relatively larger geographic areas and are authorized to contract with the United States to build and maintain water projects, build water projects of their own, manage water projects and employ eminent domain. [***Colo.*** *Rev. Stat. 37-45-118(1)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831), (1)(b)(I)(c), (1)(h) (2002). In 1999, ***Colorado*** had forty-five water conservancy districts. Corbridge & Rice, supra note 1, 5.6, at 313. Conservancy districts' statutory authority also allows them to export water from basins of origin to basins of use as long a such transfers do not impair the present or future appropriations in the basin of origin. [***Colo.*** *Rev. Stat. 37-45-118(b)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-HT23-GXJ9-34D9-00000-00&context=1516831) (2002) (e.g. facilitating transfers from ***Colorado***'s Western slope to water users on the Eastern slope). A water conservancy district is created by a majority vote of the landowners in the watershed, with the board of directors comprising people who live in the district. Id. 37-45-109(1)-(2.5), -114(1)(a). The board is authorized to tax those within the district to fund water development. Id. 37-45-121. The board has a significant amount of flexibility to assess taxes on the entire district or levy special assessment taxes on corporate entities or individuals. While irrigators are charged, the primary source of revenue comes from charging fees for uses other than irrigation and selling or leasing water within the district. Id. 37-45-118(1)(g), (1)(b)(I)(B). [↑](#footnote-ref-217)
217. 217 See About the District, N. ***Colo.*** Water Conservancy Dist., at [*http://www.ncwcd.org/ncwcd*](http://www.ncwcd.org/ncwcd) about/about main.asp (last visited Feb. 8, 2004). [↑](#footnote-ref-218)
218. 218 See Windy Gap Project, N. ***Colo.*** Water Conservancy Dist., at [*http://www.ncwcd.org/project&features/wgp*](http://www.ncwcd.org/project&features/wgp) main.asp (last visited Feb. 8, 2004). [↑](#footnote-ref-219)
219. 219 See Windy Gap Firming Project, [*http://www.ncwcd.org/project&features/wgp*](http://www.ncwcd.org/project&features/wgp) firming.asp (last visited Feb. 8, 2004); see also infra, note 235. [↑](#footnote-ref-220)
220. 220 See History and Description of the Fryingpan-Arkansas Project, Southeastern ***Colo.*** Water Conservancy Dist., [*http://www.secwcd.org/History%20and%20Description.htm*](http://www.secwcd.org/History%20and%20Description.htm) (last visited Feb. 8, 2004). [↑](#footnote-ref-221)
221. 221 See Press Release, Congressman Joel Hefley, Hefley Introduces Bill That Addresses ***Colorado***'s Future Water Needs (May 3, 2001), [*http://www.house.gov/hefley/pr*](http://www.house.gov/hefley/pr) 20010503.htm (last visited Feb. 8, 2004). [↑](#footnote-ref-222)
222. 222 See, Uncompahgre Project, supra note 175. [↑](#footnote-ref-223)
223. 223 The A-B Lateral would add winter Gunnison Tunnel diversions and create power with a run-of-the-***river*** hydropower plant. [↑](#footnote-ref-224)
224. 224 See, e.g., Corbridge & Rice, supra note 1, 5.8, at 317. Condemnation is not typically used as a means of acquiring water rights and will not be addressed here. [↑](#footnote-ref-225)
225. 225 ***Colo.*** Const. art. XVI, 6. In times of extreme shortage, domestic use (which includes municipal use) is preferred, followed by agricultural use, then manufacturing. See id. [↑](#footnote-ref-226)
226. 226 ***Colo.*** Const. art. XX, 1. Established in 1918, the Board of Denver Water Commissioners ("Denver Water") is the largest appropriator of water rights for municipal uses in ***Colorado***. See Denver Water, A Brief History, at [*http://www.water.denver.****co****.gov/aboutdw/history.html*](http://www.water.denver.co.gov/aboutdw/history.html) (last visited Dec. 1, 2003); Denver Water, An Overview, at [*http://www.water.denver.****co****.gov/aboutdw/aboutdwframe.html*](http://www.water.denver.co.gov/aboutdw/aboutdwframe.html) (last visited Dec. 1, 2003). [↑](#footnote-ref-227)
227. 227 [*City & County of Denver v. Sheriff, 96 P.2d 836, 842 (****Colo.*** *1939).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-Y2M0-0040-011T-00000-00&context=1516831) [↑](#footnote-ref-228)
228. 228 See H.R. 03-1334, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003) (allowing state engineer to approve interruptible water supply agreements between water users, like cities, without a formal adjudication). [↑](#footnote-ref-229)
229. 229 See Hydrosphere Resource Consultants, supra note 108, 3.2.2.2, at 69 (1999). [↑](#footnote-ref-230)
230. 230 [***Colo.*** *Rev. Stat. 31-35-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WX51-DYDC-J4WT-00000-00&context=1516831) (2002). [↑](#footnote-ref-231)
231. 231 Denver Water, Denver Water: An Overview, at [*http://www.water.denver.****co****.gov/aboutdw/aboutdwframe.html*](http://www.water.denver.co.gov/aboutdw/aboutdwframe.html) (last visited Dec. 15, 2003). [↑](#footnote-ref-232)
232. 232Since its inception, Denver has set rates at a level sufficient to service its debt and to meet its expenses of operation and maintenance." Id. [↑](#footnote-ref-233)
233. 233 The components of the City of Aurora's water supply, including the nine reservoirs that allow the city to supply 137,000 acre feet to its customers, are listed on their web site. See Water Supply, City of Aurora, at [*http://www.ci.aurora.****co****.us*](http://www.ci.aurora.co.us) (last visited Feb. 11. 2004). [↑](#footnote-ref-234)
234. 234 See Intent to Prepare an Environmental Impact Statement for Denver Water's Moffat Collection System Project, ***68 Fed. Reg. 54,432*** (Sept. 17, 2003). This project would provide Denver an additional 18,000 acre-feet of firm yield annually from its Fraser ***River***/Williams Fork collection system. Id. [↑](#footnote-ref-235)
235. 235 Windy Gap Firming Project, ***Colorado***-Big Thompson Project, ***Colorado***, [*68 Fed. Reg. 52,955*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:49G4-6SN0-006W-82DC-00000-00&context=1516831) (Sept. 8, 2003). This project would provide an additional 30,000 acre-feet of firm yield annually to the Front Range from the Upper ***Colorado*** ***River***. [*Id. at 52,956.*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:49G4-6SN0-006W-82DC-00000-00&context=1516831) [↑](#footnote-ref-236)
236. 236 No scoping announcement for this project appeared in the federal register; however, the Bureau released a memo seeking scoping comments. Bureau of Reclamation, Memo to Interested Agencies and Members of the Public Regarding Proposed Contract Between the Bureau of Reclamation and City of Aurora, ***Colorado*** Acting By and Through Its Utility Enterprise, for the Use of Excess Capacity in the Fryingpan-Arkansas Project, EC-1340, ENVI-6.00 (undated) (on file w/author). The Southeastern ***Colorado*** Water Conservancy District and the City of Aurora recently signed an intergovernmental agreement which puts the total increased amount of water delivered out of the Arkansas and ***Colorado*** ***River*** Basins to Aurora at 13,300 acre feet annually. Intergovernmental Agreement between the Southeaster ***Colorado*** Water Conservancy District and the City of Aurora, Oct. 3, 2003, p. 8 (on file with author). This is the water that would be stored through Aurora's contract with the Bureau that is the subject of the scoping notice. [↑](#footnote-ref-237)
237. 237 Southern Delivery System Project, Frying-Pan Arkansas Project, ***Colorado***, ***68 Fed. Reg. 52,953*** (Sept. 8, 2003). This project would supply 78 million gallons per day, which translates to over 87,000 acre-feet annually. ***Id. at 52,954.*** At least a portion of this water will come from increased yield out of ***Colorado*** Springs Homestake Project, which diverts water from the Eagle ***River*** drainage to the Arkansas ***River*** Basin. [↑](#footnote-ref-238)
238. 238 Each of the projects involves an increase in yield from existing transbasin diversions. See, infra, text accompanying notes 261-62 and 264. [↑](#footnote-ref-239)
239. 239 See Wilkinson, supra note 16, at 240-41. [↑](#footnote-ref-240)
240. 240 See Tom I. Romero, Uncertain Waters and Contested Lands: Excavating the Layers of ***Colorado***'s Legal Past, [*73 U.* ***Colo.*** *L. Rev. 521, 539-40 (2002).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:45V7-D0W0-00CV-N0GJ-00000-00&context=1516831) [↑](#footnote-ref-241)
241. 241 Felix L. Sparks, Foreword to ***Colo.*** Water Conservation Bd., Water Conservation Agencies of the State of ***Colorado*** (2d ed. 1963). [↑](#footnote-ref-242)
242. 242 ***Colo.*** Water Conservation Bd., Water Conservation Agencies of the State of ***Colorado*** 2 (2d ed. 1963). Currently, the CWCB comprises fifteen members who include the executive director of the Department of Natural Resources, the state attorney general, the state engineer, the director of the CWCB, the director of the division of wildlife, the commissioner of agriculture, and nine remaining members appointed by the governor based on geographic location. [***Colo.*** *Rev. Stat. 37-60-104(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:64WK-W7H3-CH1B-T06M-00000-00&context=1516831) (2002). The Rio Grande, North Platte, South Platte, Arkansas, Yampa-White, ***Colorado***, Gunnison-Uncompahgre, and San-Miguel-Dolores-San Juan ***river*** drainages and the City of Denver each has one member. Id. 37-60-104(2). Historically, the CWCB conducts on-going water studies, flood control planning and flood plain designation, funds small project construction, appropriates minimum stream flows, coordinates water resources with both federal and state agencies, and provides technical assistance to the WRPDA. Id. 37-60-115, -60-106(1), -60-119, -92-102(3); Corbridge & Rice, supra note 1, 3.5, at 212; [***Colo.*** *Rev. Stat. 37-95-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H6-00000-00&context=1516831) (2002). [↑](#footnote-ref-243)
243. 243 [***Colo.*** *Rev. Stat. 37-60-102*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65SB-0303-GXF6-80P2-00000-00&context=1516831) (2002). [↑](#footnote-ref-244)
244. 244 Corbridge & Rice, supra note 1, 3.5, at 207. [↑](#footnote-ref-245)
245. 245 [***Colo.*** *Rev. Stat. 37-60-115(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:654T-YC03-CGX8-04R8-00000-00&context=1516831) (2002). [↑](#footnote-ref-246)
246. 246 Id. 37-60-119. [↑](#footnote-ref-247)
247. 247 Id. 37-60-109(1). [↑](#footnote-ref-248)
248. 248 Id. 37-92-103(4). [↑](#footnote-ref-249)
249. 249 Id. 37-60-121. [↑](#footnote-ref-250)
250. 250 Id. 37-60-121(1)(a). [↑](#footnote-ref-251)
251. 251 Id. 37-60-119(2); see ***Colo.*** Water Conservation Bd., Dep't of Natural Resources, Guidelines for Assistance in the Conservation and Utilization of ***Colorado***'s Water Resources Through the ***Colorado*** Water Conservation Board Construction Fund (1975). [↑](#footnote-ref-252)
252. 252 [***Colo.*** *Rev. Stat. 37-60-122*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J32N-00000-00&context=1516831) (2002). [↑](#footnote-ref-253)
253. 253 Id. 37-60-119(2). [↑](#footnote-ref-254)
254. 254 Id. 37-60-119(1); see [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 251, at 2. [↑](#footnote-ref-255)
255. 255 [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 251, at 4-5; see also [***Colo.*** *Rev. Stat. 37-60-121(1)(b)(VI)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65RP-8F53-GXF6-83RT-00000-00&context=1516831), (VII) (2002). [↑](#footnote-ref-256)
256. 256 [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 251, at 4. [↑](#footnote-ref-257)
257. 257 [***Colo.*** *Rev. Stat. 37-60-121(1)(b)(III)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65RP-8F53-GXF6-83RT-00000-00&context=1516831) (2002). [↑](#footnote-ref-258)
258. 258 [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 251, at 4. [↑](#footnote-ref-259)
259. 259 [***Colo.*** *Rev. Stat. 37-60-121(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65RP-8F53-GXF6-83RT-00000-00&context=1516831) (2002). [↑](#footnote-ref-260)
260. 260 Id. 37-60-121(2). [↑](#footnote-ref-261)
261. 261 S. 03-110, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003). Section 2 of the bill also authorized an additional $ 13.4 million from the severance tax trust fund perpetual base account. [↑](#footnote-ref-262)
262. 262 [***Colo.*** *Rev. Stat. 37-95-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:64WK-WB63-GXJ9-32YD-00000-00&context=1516831) (2002); Act of April 9, 1982, ch. 141, 1982 ***Colo.*** Sess. Laws 538, 541. [↑](#footnote-ref-263)
263. 263 [***Colo.*** *Rev. Stat. 37-95-102(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H1-00000-00&context=1516831) (2002). [↑](#footnote-ref-264)
264. 264 Id. 37-95-107(1)(a)(I)-(II). [↑](#footnote-ref-265)
265. 265 See D. Monte Pascoe, Plans and Studies: The Recent Quest for a Utopia in the Utilization of ***Colorado***'s Water Resources, 55 U. ***Colo.*** L. Rev. 391, 407 (1984). [↑](#footnote-ref-266)
266. 266 See [***Colo.*** *Rev. Stat. 37-95-103(10)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831) (2002). [↑](#footnote-ref-267)
267. 267 Id. 37-95-109, -95-115. [↑](#footnote-ref-268)
268. 268 ***Colo.*** Const. art. XI, 3; [***Colo.*** *Rev. Stat. 37-95-109(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3HD-00000-00&context=1516831), (8) (2002). [↑](#footnote-ref-269)
269. 269 [***Colo.*** *Rev. Stat. 37-95-107.6(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H8-00000-00&context=1516831), -107.8(1) (2002). [↑](#footnote-ref-270)
270. 270 See id. 37-95-107.6(2)(a), -107.8(2)(a)(I)-(III). [↑](#footnote-ref-271)
271. 271 [***Colo.*** *Rev. Stat. 37-95-103(12.5)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831), -109(1) (2001). [↑](#footnote-ref-272)
272. 272 H.R. 02-1118, 63d Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-95-103(12.5)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831)); [***Colo.*** *Rev. Stat. 37-95-109(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3HD-00000-00&context=1516831) (2002). [↑](#footnote-ref-273)
273. 273 [***Colo.*** *Rev. Stat. 37-95-107(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H6-00000-00&context=1516831) (2002). [↑](#footnote-ref-274)
274. 274 Joey Bunch, Owens: No Secret Scheme Behind Water Referendum, Denver Post, Aug. 15, 2003. [↑](#footnote-ref-275)
275. 275 Corbridge & Rice, supra note 1, 3.5, at 213-14. [↑](#footnote-ref-276)
276. 276 Lofholm, supra note 2 ("***Colorado*** is in its worst drought in history."); see generally, Memorandum from Julie Hart to Governor Bill Owens (Apr. 30, 2002), in Water Availability Task Force, Impact Task Force Drought Assessment and Recommendations (2002), at [*http://www.colostate.edu/Depts/CSFS/govpage.html*](http://www.colostate.edu/Depts/CSFS/govpage.html) (last visited Dec. 15, 2003). [↑](#footnote-ref-277)
277. 277 Exec. Order No. D 020 02 (July 1, 2002) (Proclamation Call for the Third Extraordinary Session of the Sixty-Third General Assembly), [*http://www.leg.state.****co****.us/2002a/inetc&j.nsf/JouNav?ReadF*](http://www.leg.state.co.us/2002a/inetc&j.nsf/JouNav?ReadF) orm&Senate (last visited Dec. 15, 2003). [↑](#footnote-ref-278)
278. 278 See, e.g., S. 02S-001, 63d Gen. Assem., 3d Extra. Sess., sec. 1 (***Colo.*** 2002) (adding [***Colo.*** *Rev. Stat. 37-60-123.5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J334-00000-00&context=1516831)). This bill created a drought response fund to make loans available to agricultural organizations for emergency drought-related water augmentation purposes. The fund is supplied and administered by the CWCB and the state engineer. Id. Another bill created a temporary state income tax credit deferral for livestock operators affected by drought conditions. H.R. 02S-1010, 63d Gen. Assem., 3d Extra. Sess., sec. 1 (***Colo.*** 2002) (adding [***Colo.*** *Rev. Stat. 39-22-128*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WYK1-DYDC-J4ST-00000-00&context=1516831)). [↑](#footnote-ref-279)
279. 279 Luecke et. al., supra note 3, at 13-20, [*http://www.cotrout.org*](http://www.cotrout.org) (last visited Dec. 15, 2003). [↑](#footnote-ref-280)
280. 280 See Press Release, Office of the Governor, Owens Urges Passage of "Drought Package" to Address Current and Future Water Needs (Feb. 14, 2003), [*http://www.state.****co****.us/owenspress/02-14-03a.htm*](http://www.state.co.us/owenspress/02-14-03a.htm) (last visited Dec. 15, 2003). [↑](#footnote-ref-281)
281. 281 H.R.J. Res. 03-1015, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003); H.R.J. Res. 03-1019, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003); H.R.J. Res. 03-1048, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003); S.J. Res. 03-007, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003). [↑](#footnote-ref-282)
282. 282 S. 03-236, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003). [↑](#footnote-ref-283)
283. 283 Id. [↑](#footnote-ref-284)
284. 284 Id. [↑](#footnote-ref-285)
285. 285 See Memorandum from Rod Kuharich, Dir., to ***Colo.*** Water Conservation Bd. (July 12, 2002), [*http://cwcb.state.****co****.us/agendas/July*](http://cwcb.state.co.us/agendas/July) 02/20a-swsi.pdf (last visited Dec. 15, 2003); see also Memorandum from Rod Kuharich, Dir., to ***Colo.*** Water Conservation Bd. (Sept. 3, 2002), at [*http://cwcb.state.****co****.us/*](http://cwcb.state.co.us/) (last visited Dec. 15, 2003). These memoranda illustrate the SWSI was a priority for the CWCB well before the General Assembly authorized the money to fund the study. [↑](#footnote-ref-286)
286. 286 S. 03-110, 64th Gen. Assem., 1st Reg. Sess. sec. 14(2) (***Colo.*** 2003). [↑](#footnote-ref-287)
287. 287 Id. sec. 14(1). [↑](#footnote-ref-288)
288. 288 Id. sec. 14(1). [↑](#footnote-ref-289)
289. 289 ***Colo.*** Water Conservation Bd., Statewide Water Supply Initiative 1 (May 28, 2003), [*http://cwcb.state.****co****.us/SWSI/SWSI*](http://cwcb.state.co.us/SWSI/SWSI) SOW.pdf (last visited Dec. 15, 2003). [↑](#footnote-ref-290)
290. 290 Memorandum from Rod Kuharich, Director, ***Colo.*** Water Conservation Bd., to ***Colo.*** Water Conservation Bd. (Mar. 26, 2003) (announcing Camp Dresser & McKee as selected consultant and the development of a scope of work for the SWSI), [*http://cwcb.state.****co****.us/agendas/March*](http://cwcb.state.co.us/agendas/March) 03/23.pdf (last visited Dec. 15, 2003). [↑](#footnote-ref-291)
291. 291 See S. 03-110, 64th Gen. Assem., 1st Reg. Sess., sec. 14(1) (***Colo.*** 2003). [↑](#footnote-ref-292)
292. 292 [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 289, at 2, 16, 34, 43, 48. [↑](#footnote-ref-293)
293. 293 See id. at 9; Letter from Rod Kuharich, Dir., ***Colo.*** Water Conservation Bd., to Interested Parties regarding Basin Roundtable Nominees 2 (July 23, 2003) (on file with author). [↑](#footnote-ref-294)
294. 294 S. 03-110, 64th Gen. Assem., 1st Reg. Sess., sec. 14(1) (***Colo.*** 2003); see [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 289, at 34-42. [↑](#footnote-ref-295)
295. 295 See Justice Gregory J. Hobbs, ***Colorado*** Water Law: An Historical Overview, 1 U. Denv. Water L. Rev. 1, 2 (1997). The General Assembly has previously rejected planning bills. See, e.g., H.R. 99-1050, 62d Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003). [↑](#footnote-ref-296)
296. 296 See ***Colo.*** Water Conservation Bd., Scope of Work for a Study of the ***Colorado*** ***River*** Return Project (CRRP) 2 (Nov. 7, 2002), [*http://cwcb.state.****co****.us*](http://cwcb.state.co.us); see also Matt Sura, Address at the ***Colorado*** ***River*** Return Project Informational Workshop (Dec. 10, 2002), at [*http://www.crwcd.gov/BigStrawWorkshopfinalreport.pdf*](http://www.crwcd.gov/BigStrawWorkshopfinalreport.pdf) (last visited Dec. 15, 2003). [↑](#footnote-ref-297)
297. 297 Boyle Engineering Corp., ***Colorado*** ***River*** Return Reconnaissance Study Summary Report 9 (Nov. 14, 2003), [*http://cwcb.state.****co****.us/SecB/CRRRS*](http://cwcb.state.co.us/SecB/CRRRS) SUMMARY REPORT.pdf (last visited Dec. 15, 2003). Prior to release of the Reconnaissance Study, when the legislature was debating the Big Straw, costs were anticipated to be significant. See Steven K. Paulson, Stopping the Water: "Big Straw' Project Could Fill Reservoirs from ***Colorado*** ***River***, Rocky Mountain News, Jan. 2, 2003 (some estimate the cost to be more than $ 5 billion). [↑](#footnote-ref-298)
298. 298 See ***Colo.*** Trout Unlimited, The Big Straw, at [*http://www.cotrout.org/big*](http://www.cotrout.org/big) straw.htm (last visited Dec. 15, 2003); Deborah Frazier, Mega Water Plan: The Big Straw Could Draw From ***Colorado*** ***River***, Ease Drought, Rocky Mtn. News, July 25, 2002, at[*4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831)A [hereinafter Frazier I]. [↑](#footnote-ref-299)
299. 299 [***Colorado*** *Trout Unlimited, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XHV0-0040-03SY-00000-00&context=1516831) note 298; Bob Ewegan, Utopia, Denver Post, Oct. 16, 2002. [↑](#footnote-ref-300)
300. 300 S. 03-110, 64th Gen. Assem., 1st Reg. Sess., sec. 15(2) (***Colo.*** 2003); see generally ***Colorado*** Fiscal Policy Institute, ***Colorado***'s Budget: Challenge, Crisis, or Train Wreck? (rev. Sept. 2003), at [*http://www.cclponline.org/pubs/index.htm*](http://www.cclponline.org/pubs/index.htm) (last visited Dec. 15, 2003). [↑](#footnote-ref-301)
301. 301 ***Colo.*** S. 03-110, sec. 15. The CWCB's contractor did so. See, Boyle Engineering Corporation, supra note 297. [↑](#footnote-ref-302)
302. 302 ***Colo.*** State Senator Mark Hillman, End the Water Insanity, Aug. 24, 2003, at [*http://www.markhillman.com/results.php3?news*](http://www.markhillman.com/results.php3?news) id=409. [↑](#footnote-ref-303)
303. 303 H.R.J. Res. 03-1011, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003). [↑](#footnote-ref-304)
304. 304 See Frazier I, supra note 298, at 4A. [↑](#footnote-ref-305)
305. 305 See id. [↑](#footnote-ref-306)
306. 306 See, e.g., Deborah Frazier, Big Straw Project: Who Would Pay?, Rocky Mtn. News, June 11, 2003, at [*20*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T262-8T6X-730V-00000-00&context=1516831)A [hereinafter Frazier II]. [↑](#footnote-ref-307)
307. 307 It is likely that new dams would need to be constructed, environmental mitigation costs would be substantial, impacts of moving large amounts of poor quality water from the state line to high quality waters in the mountains would make treating the water more difficult and expensive, $ 168 million would be spent annually on pump-back costs, and if the region experiences future droughts, there may not be "excess" water available. If ***Colorado*** develops its full compact entitlement in years of average precipitation, there is only excess water available in years of above average precipitation. See Frazier II, supra note 306, at 20A; see also Paulson, supra note 297. [↑](#footnote-ref-308)
308. 308 [***Colo.*** *Water Conservation Bd., supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) note 296, at 2. [↑](#footnote-ref-309)
309. 309 See Frazier I, supra note 298, at 4A. [↑](#footnote-ref-310)
310. 310 Cf. id. This would be particularly ironic given Mike Serlet's statement that the project is "a dog" and the environmentalists would eat project proponents alive. Id. [↑](#footnote-ref-311)
311. 311 S. 03-236, 64th Gen. Assem., 1st Reg. Sess., sec. 4 (***Colo.*** 2003) (amending [***Colo.*** *Rev. Stat. 37-95-103(12.5)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831)). [↑](#footnote-ref-312)
312. 312 Id. sec. 1 (adding ***Colo.*** Rev. Stat. 37-60-203). [↑](#footnote-ref-313)
313. 313 H.R. 03-1001, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (amending [***Colo.*** *Rev. Stat. 37-95-109(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3HD-00000-00&context=1516831)). [↑](#footnote-ref-314)
314. 314 ***Colo.*** S. 03-236 (amending [***Colo.*** *Rev. Stat. 37-95-103(12.5)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:630C-J5D3-GXJ9-34H2-00000-00&context=1516831)). [↑](#footnote-ref-315)
315. 315 Id. sec. 5 (amending [***Colo.*** *Rev. Stat. 37-95-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H6-00000-00&context=1516831)). [↑](#footnote-ref-316)
316. 316 Id. sec. 6 (deleting [***Colo.*** *Rev. Stat. 37-95-107.5(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H7-00000-00&context=1516831), (b), (c)). [↑](#footnote-ref-317)
317. 317 Id. (amending [***Colo.*** *Rev. Stat. 37-95-107.5(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H7-00000-00&context=1516831)). [↑](#footnote-ref-318)
318. 318 ***Colo.*** H.R. 03-1001, sec. 1 (amending [***Colo.*** *Rev. Stat. 37-95-109(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3HD-00000-00&context=1516831)). [↑](#footnote-ref-319)
319. 319 ***Colo.*** S. 03-236, sec. 1. [↑](#footnote-ref-320)
320. 320 This new financing authority is an order of magnitude greater than that afforded the CWCB via the construction fund. See supra note 261 and accompanying text; cf. [***Colo.*** *Rev. Stat. 37-60-119*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J32C-00000-00&context=1516831) (2002). The CWCB can contract with private citizens, corporations, and agencies of the state and federal government for use of water supplied by projects owned by the state. The CWCB charges these entities, and any amount collected in excess becomes a part of the CWCB construction fund. The authority of the CWCB to pay for projects through the construction fund is based upon the need and capital of the sponsor of a water project. Id. 37-60-119 to -121; see also id. 37-60-121(b)(VI), (VII). [↑](#footnote-ref-321)
321. 321 ***Colo.*** S. 03-236, sec. 1 (adding ***Colo.*** Rev. Stat. 37-60-203, -206). [↑](#footnote-ref-322)
322. 322 Id. [↑](#footnote-ref-323)
323. 323 [***Colo.*** *Rev. Stat. 37-95-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H6-00000-00&context=1516831) (2002) (amended 2003). [↑](#footnote-ref-324)
324. 324 ***Colo.*** S. 03-236, sec. 1 (now codified as ***Colo.*** Rev. Stat. 37-60-203(2)). [↑](#footnote-ref-325)
325. 325 Id. (adding 37-60-203(2)(a)). [↑](#footnote-ref-326)
326. 326 Id. (adding 37-60-203(4)). [↑](#footnote-ref-327)
327. 327 Id. (adding 37-60-204). [↑](#footnote-ref-328)
328. 328 Id. (adding 37-60-208). [↑](#footnote-ref-329)
329. 329 See generally Michael C. Bender, West Slope Interests Not Protected in Referendum A, Say Legal Experts, Daily Sentinel (Grand Junction), Aug. 7, 2003; Todd Hartman, Arguments Flood Dams Proposal, Rocky Mtn. News, Sept. 15, 2003, at [*14*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T5M2-D6RV-H38C-00000-00&context=1516831)A. [↑](#footnote-ref-330)
330. 330 Jerd Smith, Water Plan Is All Washed Up, Rocky Mtn. News, Nov. 5, 2003, at [*7*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831)A. [↑](#footnote-ref-331)
331. 331 See [***Colo.*** *Rev. Stat. 37-80-104*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J35H-00000-00&context=1516831), 37-60-106, -109(1) (2002). [↑](#footnote-ref-332)
332. 332 Cf. [***Colo.*** *Rev. Stat. 37-60-121(2.5)(a)(II)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65RP-8F53-GXF6-83RT-00000-00&context=1516831). [↑](#footnote-ref-333)
333. 333 Id. 37-60-121.1. [↑](#footnote-ref-334)
334. 334 Id. 37-60-121(2.5)(a)(I). [↑](#footnote-ref-335)
335. 335 Id. 37-60-119, -95-107.6. [↑](#footnote-ref-336)
336. 336 S. 1, 75th Leg. 1.01 (Tex. 1997); Wyoming State Water Plan, at [*http://waterplan.state.wy.us/*](http://waterplan.state.wy.us/) (last modified Dec. 17, 2003). [↑](#footnote-ref-337)
337. 337 Reisner, supra note 183, at 355-57. [↑](#footnote-ref-338)
338. 338 Evidenced by no state projects constructed to date and the General Assembly's past rejection of state planning. See supra note 295. [↑](#footnote-ref-339)
339. 339 In 2000, Senator John Evans introduced Senate Bill 215. S. 00-215, 62d Gen. Assem., 2d Reg. Sess. (***Colo.*** 2000). Like Senate Bill 236, Senate Bill 215 would have increased the scope of the CWCB's authority. The bill directed the CWCB to study possibilities for large-scale, transbasin water infrastructure projects to "plan for the growth in water supply demands caused by [***Colorado***'s] population growth." Id. sec. 10. Furthermore, the CWCB was to be the bonding entity to finance project construction as well. Id. One reason Senate Bill 215 did not pass was the blatant inequity of its approach, which was limited to targeting one large ***Colorado*** or Gunnison Basin project to store 120,000 acre-feet, two-thirds of which would be exported to the Front Range for use. Id. By contrast, Senate Bill 236 directs cooperation, even as it provides the CWCB with much more freedom to act at its discretion without oversight and subsequent mandatory restrictions from the legislature. S. 03-236, 64th Gen. Assem., 1st Reg. Sess., sec. 1 (***Colo.*** 2003) (now codified at ***Colo.*** Rev. Stat. 37-60-204). For instance, while Senate Bill 215 required the CWCB obtain approval of the General Assembly for any water development project that the CWCB recommended, Senate Bill 236 only requires approval by the governor. See id. [↑](#footnote-ref-340)
340. 340 See, e.g., Written in Water: The Wrong Fix for Water Woes, Denver Post, May 11, 2003, at E2; see supra notes 234-238 and accompanying text. [↑](#footnote-ref-341)
341. 341 [***Colo.*** *Rev. Stat. 37-95-107.5(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3H7-00000-00&context=1516831) (Cum. Supp. 1989). [↑](#footnote-ref-342)