

# [***SYMPOSIUM: The Water Rights Determination and Administration Act of 1969: A Western Slope Perspective on the First Thirty Years***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TT-00000-00&context=1516831)

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**Text**

**[\*39]** **I. INTRODUCTION**

While the Western Slope is relatively small in terms of population and large in terms of geographic area, different perspectives on water emerge as one moves from busy ski resorts through "down-valley" communities and past ranches, farms, and orchards. However, one thing most Western Slope residents seem to agree upon is the seemingly incomparable natural beauty of the area. In recent years, the Western Slope's natural wonders have fueled recreational industries such as skiing, rafting, mountain biking, fishing, and **[\*40]** hunting. These industries not only bring growth to many areas of the Western Slope, but bring new and, in some cases, nontraditional demands on its natural resources.

One aspect of the Western Slope's unique natural environment is its relative abundance of water in comparison to other ***Colorado*** areas. Yet, ***Colorado*** water law fails, in some ways, to address this unique condition. Most aspects of ***Colorado*** water law apply statewide, regardless of whether one is on the Eastern Plains, along the Front Range, in the San Luis Valley, or in the high mountains and valleys of the upper ***Colorado*** ***River*** basin on ***Colorado***'s Western Slope.

From a water allocation perspective, Congress sealed ***Colorado***'s fate as soon as it adopted the state's rectangular boundaries in 1876. ***Colorado*** is a headwaters state, straddling the Continental Divide and is the source of seven major ***river*** systems that send water out of the state in all directions. In stark contrast to its adopted method of water allocation by prior appropriation, many ***Colorado*** residents maintain a deep-seated sentiment that water in local streams is "theirs" and local residents have an inherent entitlement to develop, use, protect, and preserve local water supplies for their own existing and future use. After all, water in its naturally occurring location is as much an essential feature of a place as its topography, flora, and fauna. Perhaps more than any other natural feature, the existence of water dictates the habitability of an area.

The ***Colorado*** General Assembly adopted the Water Rights Determination and Administration Act of 1969 [[1]](#footnote-2)1 ("1969 Act") for the primary purpose of integrating groundwater into the existing surface water adjudication and administration system. Although the 1969 Act contained a number of other substantive changes, [[2]](#footnote-3)2 the Act was predominantly procedural. It established seven water divisions associated with each of the seven major ***river*** basins in ***Colorado*** and provided for the appointment of a "water judge" for each division. [[3]](#footnote-4)3 It also provided for significant participation of the Division of Water Resources, acting through the state and division engineers in each division, in both adjudication and administration of surface and groundwater rights. [[4]](#footnote-5)4

The 1969 Act encourages appropriation and use of all of the State's water resources, not unlike mining and grazing policies that brought ***Colorado***'s first settlers. Despite the new procedures set forth in the 1969 Act, the concepts of "first in time, first in right" and "use it **[\*41]** or lose it" remain deeply embedded in the State's water allocation scheme. The 1969 Act contains a number of water allocation tools that apply statewide. However, these tools were not necessarily designed to serve the needs of a sparsely populated area like the Western Slope which is located in the middle of the arid West yet has a relatively abundant and accessible water supply. To some, the Western Slope's unique geographic and hydrologic qualities, and its evolving demographics, require reconsideration of a pure prior appropriation system as applied on a statewide basis in ***Colorado***. Others express outrage at such a prospect and argue that ***Colorado*** has already strayed too far from its hallowed status as a "pure" appropriation state.

This article examines the effect of the 1969 Act and other related laws on modern water resource allocation on the Western Slope and suggests that even a doctrine as deeply entrenched as the doctrine of prior appropriation is evolving to accommodate changing values and conditions. First, the 1969 Act integrated surface and groundwater management throughout ***Colorado***. While this necessarily caused increased reliance on augmentation plans as a method of securing protected water supplies within the priority system, the subsequent creation of "exempt wells" suggests that ***Colorado***'s "pure" prior appropriation system is not totally inviolate. Second, although operating within the priority system, the provisions in the 1969 Act allowing for the adjudication of exchanges and plans for augmentation have modernized water allocation by encouraging creative solutions. Third, while the 1969 Act contains no express basin-of-origin protections, water exports from the Western Slope have been constrained by certain amendments to the 1969 Act and by other legislation. Finally, although the original 1969 Act continued the traditional definition of a water right as an "appropriation" for a "beneficial use," these core concepts have evolved to recognize and protect "instream" uses for the benefit of the environment. Each of these modifications dramatically affected water resource allocation on the Western Slope and may foretell that further changes lie ahead.

**II. THE INTEGRATED ADMINISTRATION OF SURFACE WATER AND GROUNDWATER AND THE CREATION OF LIMITED EXCEPTIONS TO THE PRIORITY SYSTEM FOR SMALL CAPACITY WELLS**

The most significant substantive provision in the 1969 Act, the integration of groundwater administration with surface water administration, [[5]](#footnote-6)5 passed without much input or involvement from Western Slope interests. [[6]](#footnote-7)6 In the first years following the 1969 Act, the **[\*42]** Western Slope felt little effect because many ***river*** drainages had yet to become over-appropriated. Well permits were readily available and were issued in most areas, with the exception of over-appropriated side tributaries. However, as water development proceeded, water shortages occurred and major systems such as the ***Colorado*** and Gunnison ***Rivers*** were declared to be "over-appropriated." [[7]](#footnote-8)7 Water courts then required augmentation plans for most new wells on the Western Slope. However, shortly after the 1969 Act's passage, the ***Colorado*** legislature exempted certain small wells from administration pursuant to the 1969 Act. [[8]](#footnote-9)8 These "exempt wells" constitute a significant step away from "pure" prior appropriation doctrine and play a major role in water resources planning in Western ***Colorado***.

While most geologists agree that underground waters are connected to surface waters in most instances, the concept of integrated administration is not easily applied on the Western Slope. According to Orlyn Bell, the Division Engineer for Water Division Number 5, [[9]](#footnote-10)9 the cumulative total of all groundwater diversions within Division Number 5 has no appreciable effect on total ***river*** administration. [[10]](#footnote-11)10 The integration of groundwater and surface water administration remains a very significant issue on ***Colorado***'s Eastern Slope and in ***Colorado***'s San Luis Valley because of the existence of large capacity irrigation wells in these areas. Many wells on the Eastern Slope produce hundreds of gallons per minute. [[11]](#footnote-12)11 In contrast, wells on **[\*43]** the Western Slope produce an average of five to fifty gallons per minute due to limited groundwater availability. [[12]](#footnote-13)12 Appropriators on the Western Slope typically obtain groundwater from fractured aquifers and shallow alluviums which are not high producing and practical sources for extensive irrigation. [[13]](#footnote-14)13

Since the 1969 Act, the ***Colorado*** Supreme Court continues to uphold increasingly tight administrative controls over tributary groundwater. For instance, in *Hall v. Kuiper*, the court determined that the state engineer could refuse to issue well permits in over-appropriated areas because injury could result to the rights of others even though unappropriated water may be available at certain times. [[14]](#footnote-15)14 As noted above, augmentation plans were not common on the Western Slope until the late 1970s and 1980s when the state and division engineers began to deny well permits after determining ***river*** systems had become over-appropriated. [[15]](#footnote-16)15 In *Fox v. Division Engineer*, the ***Colorado*** Supreme Court determined that a conditional water right for a groundwater diversion could not be issued in Water Division Number 5 absent judicial approval of an augmentation plan. [[16]](#footnote-17)16 Today, augmentation plans are common in most Western Slope areas.

Despite ***Colorado*** Supreme Court decisions such as *Hall v. Kuiper* [[17]](#footnote-18)17 and *Fellhauer v. People*, [[18]](#footnote-19)18 in the years immediately following the 1969 Act's passage, the ***Colorado*** legislature created a statutory exemption from the 1969 Act's administrative procedures and a rebuttable presumption of non-injury for certain small capacity commercial and residential wells. [[19]](#footnote-20)19 Due to the high cost of augmentation plans and the **[\*44]** high demand for residential lots in rural mountain areas in ***Colorado*** over the past several decades, these "exempt wells" have played a very significant role in water resources planning and development on the Western Slope.

The current exempt well statute includes three categories of exemptions for small wells. [[20]](#footnote-21)20 The pumping rate from these wells is generally limited to fifteen gallons per minute [[21]](#footnote-22)21 and all waste water must be returned to the stream system from which it originated. [[22]](#footnote-23)22 Many ranch, rural, and mountain households receive their domestic water via wells. If administered along with all adjudicated surface water rights pursuant to the 1969 Act, many of these wells would not be senior enough to avoid curtailment. [[23]](#footnote-24)23 Consequently, if exempt wells did not exist, many landowners would have been severely penalized by the 1969 Act's integration of groundwater with surface water; hence, rural properties would be much more difficult to develop.

The constitutionality of the exempt well statute has not been addressed by the ***Colorado*** Supreme Court. Widespread reliance on exempt wells, coupled with the minimal impact of individual exempt wells, may explain the lack of significant challenges to this apparent affront to the prior appropriation doctrine. Although the ***Colorado*** Constitution articulates a hierarchy of uses when stating "those using water for domestic purposes shall have the preference over those using water for any other purpose," [[24]](#footnote-25)24 this clause has been interpreted by the **[\*45]** ***Colorado*** Supreme Court as a right to condemn, not a right to call out senior appropriators making "inferior" uses. [[25]](#footnote-26)25

There is very little case law interpreting the exempt well statute or giving guidance on its enforceability. [[26]](#footnote-27)26 The current exempt well statute provides owners of exempt wells with the option of adjudicating water rights for such wells in the water courts. [[27]](#footnote-28)27 In such a case, the court can award a priority date based on first use, as opposed to the filing date. [[28]](#footnote-29)28

However, there is some question as to what effect adjudication has on an otherwise "exempt structure." In other words, although a priority date can be assigned to an exempt well in an adjudication, granting the owner of a well standing to object to injury in other water proceedings, of what importance is priority if such a structure is not administered pursuant to the priority system? Furthermore, can an "exemption" to the priority system exist notwithstanding article XVI, section 6, of the ***Colorado*** Constitution which provides that "priority of appropriation shall give the better right as between those using the water for the same purpose"? [[29]](#footnote-30)29

The necessity for augmentation plans for non-exempt groundwater diversions has increased over the years as "exempt wells" have been increasingly regulated and restricted. [[30]](#footnote-31)30 However, the almost thirty-year existence of exempt wells may indicate general acceptance that ***Colorado***'s "pure" prior appropriation system has evolved to include an exception based on amount and type of use as opposed to appropriation date. Whether intended or not, the exempt well statute constitutes legislative favoritism of small rural households and certain businesses. Only time will tell if the priority system will continue to evolve to permit other preferred uses outside of the priority system.

**III. AUGMENTATION PLANS AND EXCHANGES--CREATIVE TOOLS WHICH ENHANCE EFFICIENT ALLOCATION WITHIN THE PRIORITY SYSTEM**

Another major change contained in the 1969 Act greatly impacting water resource planning on the Western Slope are provisions allowing for the adjudication of augmentation plans, water rights changes, and **[\*46]** water rights exchanges. [[31]](#footnote-32)31 Although the original 1969 Act did relatively little to alter ***Colorado***'s "pure" prior appropriation system, by providing enhanced flexibility, these provisions facilitate creative uses of water within the priority system. Without these major additions, it would have been exceedingly difficult for the Western Slope to find the water resources necessary to support newer uses, such as snowmaking for ski areas and domestic water for small municipal and local water systems.

The 1969 Act defines "plan for augmentation" as:

a detailed program . . . to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any *other appropriate means*. [[32]](#footnote-33)32

When the ***Colorado*** legislature passed the 1969 Act, it was perhaps thought that augmentation plans would relate principally to the pumping of groundwater from large underground water supplies on the Eastern plains when surface water rights would otherwise be out-of-priority. [[33]](#footnote-34)33 Augmentation plans on the Western Slope typically relate to the development of domestic water systems supplied by wells. Such plans usually involve the establishment of a "bank" of replacement water by using the dry-up of historically irrigated acreage or water stored in priority for later release during times of shortage.

Appropriators use these waters to replace any water "taken from" other vested water rights and thereby avoid injury. The 1969 Act's change of water right provision [[34]](#footnote-35)34 allows owners of water rights to change the place of use or type of use of a conditional or an absolute water right. [[35]](#footnote-36)35 The 1969 Act confirmed the right to claim "consumptive use credits" for historical irrigation and applying such credits to new uses such as domestic, municipal, or commercial as parts of approved plans for augmentation.

An exchange of water rights permits an appropriator to dewater a **[\*47]** certain stream reach so long as the appropriator provides replacement water at the correct time and place in order to satisfy calling seniors. [[36]](#footnote-37)36 While exchanges allow flexibility in the development of protected water supplies, they also affect flows on critical reaches used for recreational use or fish and wildlife habitat. On the Western Slope, most streams and ***rivers*** have certain reaches with water shortages, such as mountain tributaries, and certain reaches with water abundance, such as the lower ***Colorado*** ***River*** or the Gunnison ***River*** near Grand Junction and the lower Yampa ***River*** in Northwest ***Colorado***. Exchanges allow upstream appropriators to divert out-of-priority while satisfying lower basin rights with other sources, such as releases from large on-channel reservoirs. Unlike other areas in ***Colorado***, the Western Slope benefits from a number of large storage projects that make water available for contract, augmentation, or exchange purposes. Such facilities include: Green Mountain and Wolford Mountain Reservoirs on the ***Colorado*** ***River***; Ruedi Reservoir on the Frying Pan ***River***; and Blue Mesa Reservoir on the Gunnison ***River***. [[37]](#footnote-38)37 These large "buckets" greatly enhance opportunities for new water uses on the main channels of such ***river*** systems without the tremendous expense required to construct individual storage facilities for augmentation or for exchange purposes.

Appropriators implemented the 1969 Act's provisions for augmentation plans, changes, and exchanges just prior to the resort boom which hit ***Colorado*** in the 1970s. Although these concepts operate within the prior appropriation system, they have facilitated continued growth of the Western Slope by allowing for water development of new uses such as domestic, municipal, and snowmaking without causing injury to senior calling rights. Without flexible "tools" such as augmentation plans, changes, and exchanges, ***Colorado***'s pure appropriation system would have severely hindered development in over-appropriated areas on the Western Slope long ago. Once again, the "pure" prior appropriation system has arguably shown that it continues to evolve in order to accommodate changing demands and uses.

**IV. TRANSBASIN DIVERSIONS AND BASIN-OF-ORIGIN PROTECTIONS--CHALLENGES TO "PURE" PRIOR APPROPRIATION ON *COLORADO*'S WESTERN SLOPE**

Most ***Colorado*** residents unite in their resolve to protect the unused portion of the state's compact entitlements from thirsty downstream neighbors, despite rapid development by and urgent needs of those neighbors. Among Coloradans, it is generally accepted that the state should preserve its unused share for its future needs. **[\*48]** Curiously, however, this rather provincial approach to interstate water allocation does not carry over to intrastate water allocation.

The ***Colorado*** Constitution entitles Coloradans to appropriate the waters of the State, which the public owns. [[38]](#footnote-39)38 The Constitution draws no distinction between water appropriations for use within basins of origin and for export to other drainages. Not only are transbasin appropriations possible, they are encouraged by a longstanding principle of ***Colorado*** water law that allows the importer to use, reuse, and successively use imported water to extinction. [[39]](#footnote-40)39 By essentially preserving ***Colorado***'s "pure" prior appropriation system, the 1969 Act continued the right to appropriate water from one ***river*** basin for use in another, without any preference for use within a native basin.

This situation has provoked frequent arguments by the Western Slope for statutory basin-of-origin protection. Yet, the majority of ***Colorado***'s population resides on the rapidly developing Eastern Slope, requiring a constant need to acquire additional water supplies. The Eastern Slope population commands a majority vote in the General Assembly, and, as a result, Western Slope legislators have been unsuccessful in securing statutory basin-of-origin protections which apply to all potential transmountain diversions. [[40]](#footnote-41)40 Nevertheless, other ***Colorado*** statutes have indirectly assisted the Western Slope's ability to protect its native waters.

In 1937, the ***Colorado*** legislature passed the Water Conservancy Act ("the WCA"), [[41]](#footnote-42)41 establishing water conservancy districts throughout the state to provide for "the greatest beneficial use of water within this state." [[42]](#footnote-43)42 The legislature clearly did not intend the WCA to preserve or conserve water, but rather to encourage the control and the use of "all unappropriated waters originating in this state to a direct and supplemental use of such waters for domestic, manufacturing, irrigation, power, and other beneficial uses." [[43]](#footnote-44)43 However, a brief provision in the WCA has significantly influenced the development of Western Slope water resources over the past fifty years. The section provides that any Water Conservancy District facilities which export water from the ***Colorado*** ***River*** basin:

**[\*49]** shall be designed, constructed and operated in such manner that the present appropriations of water and, in addition thereto *prospective uses of water* for irrigation and other beneficial consumptive use purposes . . . within the natural basin of the ***Colorado*** ***river*** in the state of ***Colorado***, from which water is exported, *will not be impaired nor increased in cost* at the expense of the water users within the natural basin. [[44]](#footnote-45)44

This provision resulted in the construction of "compensatory storage" projects by Eastern Slope appropriators and transmountain diverters. [[45]](#footnote-46)45 However, the WCA only applies to Water Conservancy Districts and not to other water exporters such as municipalities (*e.g.*, Denver, ***Colorado*** Springs, and Aurora) or private water users; therefore, it provides only limited protection to the Western Slope. [[46]](#footnote-47)46 When the 1969 Act was passed, the Western Slope did not make a serious effort to expand the basin-of-origin protection ostensibly because it recognized that the 1969 Act would never pass with such a provision. [[47]](#footnote-48)47 Additionally, at that time, the ***Colorado*** ***River*** Water Conservation District was occupied in attempting to secure funding for large storage projects, perceived to be in the Western Slope's best interests. [[48]](#footnote-49)48

In the absence of basin-of-origin protection applicable to all transbasin diversions, the Western Slope has turned to other statutory tools for protecting its native water resources. One example is House Bill 1041, which the ***Colorado*** legislature enacted in 1974 and was designed to allow local governments to protect "areas and activities of state interest." [[49]](#footnote-50)49 House Bill 1041 gave local governments regulating authority for the development of lands within their jurisdictions. Western Slope counties have successfully invoked "1041 powers" imposing restrictions on water development, including the construction of reservoirs and diversion projects. In *City & County of Denver v. Board of County Commissioners*, [[50]](#footnote-51)50 the ***Colorado*** Supreme Court upheld the rights of Eagle County and Grand County to regulate site **[\*50]** selection and construction of major new water systems as state interest activities. [[51]](#footnote-52)51 While House Bill 1041 gives added powers to local governments in headwaters areas, which are most susceptible to water exports, it should be noted that this statute is not very useful to lower counties on the Western Slope. Counties such as Garfield, Mesa, Delta, and Montrose lie downstream on the Gunnison and ***Colorado*** ***Rivers*** from many existing or proposed transbasin diversions.

Other tools used by basins of origin to discourage water exports evolved through case law and later amendments to the 1969 Act. In ***Colorado******River*** *Water Conservation District v. Vidler Tunnel Water* ***Co****.*, [[52]](#footnote-53)52 a private water company applied for a conditional water right for a 90,000 acre-foot reservoir even though the applicant only had specific uses for about 4,000 acre-feet. The ***Colorado*** Supreme Court held that the ***Colorado*** Constitution "guarantees a right to appropriate, [but] not a right to speculate. The right to appropriate is for *use*, not merely for profit." [[53]](#footnote-54)53 The ***Colorado*** legislature reinforced this decision by amending the 1969 Act to include a provision commonly referred to as the "can and will" statute. [[54]](#footnote-55)54 The "can and will" provision further refined the definition of "appropriation" by providing:

no claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time. [[55]](#footnote-56)55

The supreme court has held that the "can and will" statute allows water courts to inquire into many issues relating to a claimed appropriation, including water availability [[56]](#footnote-57)56 and, in certain circumstances, the status of required land use approvals or easements. [[57]](#footnote-58)57

The "can and will" statute applies statewide as part of the 1969 Act and has served as a tool for challenging large transbasin diversion projects. Perhaps the Western Slope's most significant use of the "can and will" doctrine, to guard against transbasin diversions, occurred in recent litigation involving an attempt by several Front Range local governments to build a large new transbasin project known as the Union Park project. The Union Park project would have delivered water to the Eastern Slope from the headwaters of the Gunnison ***River***. **[\*51]** In *Board of County Commissioners v. United States*, [[58]](#footnote-59)58 the ***Colorado*** Supreme Court upheld the dismissal by the district court for Water Division Number 4 of a 900,000 acre-foot claim for Union Park Reservoir. In reaching its decision, the supreme court noted that the "can and will" statute has gone "beyond the anti-speculation doctrine of *Vidler* by adding the requirement that an applicant for a conditional water right decree . . . demonstrate that water can and will be beneficially used." [[59]](#footnote-60)59 While the courts continue to refine the breadth of the "can and will" limitation, the provision promises to be a focal point in future adjudications.

While the 1969 Act certainly was not intended to protect native waters from export, the "can and will" statute and other legislation, such as the WCA and House Bill 1041, have, in some circumstances, served to protect the Western Slope from water exports to other areas in ***Colorado***. Perhaps these provisions threaten the constitutional right to appropriate. On the other hand, perhaps these provisions confirm that ***Colorado*** water law, like the 1969 Act itself, continues to evolve to meet changing values and conditions.

**V. MODERN CHALLENGES TO TRADITIONAL CONCEPTS OF "APPROPRIATION" AND "USE"**

Many parts of the Western Slope are undergoing a major shift from an economy centered around agriculture and ranching to one primarily driven by recreation and resorts. [[60]](#footnote-61)60 The natural beauty of the Western Slope attracts visitors from all over the world to ski, hunt, fish, kayak, raft, camp, hike, and bike. These demands have spawned a modern-day land rush for slope-side condominiums, golf course communities, gentleman ranches, remote hunting and fishing lodges, and, for those who can afford it, their own slice of the earth's remaining wilderness. This fundamental transition is perhaps most apparent along the I-70 corridor and in the Roaring Fork Valley. In these areas, ranchland and irrigated pastures are being converted to golf course communities and housing developments at a staggering rate. Although the preservation of water flowing within its natural streams is essential for fish and wildlife habitat and for other "non-human" interests, preservation is also essential to the Western Slope's new economy. The prior appropriation system continues to struggle with how to accommodate these new demands within a system designed to facilitate rapid appropriation of water resources for **[\*52]** traditional "beneficial" uses such as agriculture and mining.

Despite changing needs and values in Western ***Colorado***, the state's "pure" appropriation system largely ignores the economic or other values associated with leaving water in its natural water course. In fact, one commentator observed that: "***Colorado***'s system of appropriative water rights has literally mandated the drying up of every natural stream in the state." [[61]](#footnote-62)61 The 1969 Act did nothing to improve this situation. As originally adopted, the Act included no tools with which to protect waters within natural streams for recreational, piscatorial, aesthetic, or any other purposes. In fact, the 1969 Act codified [[62]](#footnote-63)62 the common law requirement [[63]](#footnote-64)63 that water be removed from its streambed in order to effectuate a valid appropriation, thereby effectively preventing any instream appropriations. Nevertheless, heightened environmental awareness and changing values have slowly eroded some of the "purity" reflected in the original 1969 Act.

A. STATUTORY INSTREAM FLOW PROTECTIONS

In 1973, the General Assembly took what now seems like a very small step away from the original prior appropriation system, but which at the time constituted a controversial issue in ***Colorado*** law. [[64]](#footnote-65)64 The General Assembly passed Senate Bill 97, amending the 1969 Act to allow the ***Colorado*** Water Conservation Board ("CWCB") [[65]](#footnote-66)65 appropriate minimum stream flows for the limited purpose of "protecting the natural environment to a reasonable degree." [[66]](#footnote-67)66

The creation of instream flow protections required the relaxation of the 1969 Act's original definition of appropriation. No longer would "appropriation" be defined as "the *diversion* of a certain portion of the waters of the state . . . ." [[67]](#footnote-68)67 Instead, the General Assembly redefined appropriation as "the application of a specified portion of the waters of the state to a beneficial use . . . ." [[68]](#footnote-69)68 To acknowledge the benefits *to humans* of water flowing in the state's natural streams, the General Assembly amended the definition of "beneficial use" to read:

for the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of ***Colorado*** in the manner prescribed by law of such minimum flows **[\*53]** between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree. [[69]](#footnote-70)69

There was little dispute that Senate Bill 97 represented a significant departure from ***Colorado***'s pure appropriation system. The ***Colorado*** ***River*** Water Conservation District argued that it was unconstitutional. [[70]](#footnote-71)70 Some commentators predicted that the recognition of instream flows marked the beginning of a slippery slope toward a public trust doctrine, while others characterized the legislation as portending a "resurgence of riparianism." [[71]](#footnote-72)71 None of these dire predictions have proven accurate, and the instream flow program is now an accepted component of ***Colorado***'s prior appropriation system.

Although Senate Bill 97 represented a departure from ***Colorado***'s "pure" appropriation doctrine, recent history demonstrates that it is only a limited tool for protecting instream uses which was further restricted by 1981 amendments. [[72]](#footnote-73)72 Only the CWCB can create and enforce instream flow rights. [[73]](#footnote-74)73 Further, the CWCB can "preserve the natural environment to a reasonable degree" [[74]](#footnote-75)74 but only if a natural environment exists such that the CWCB can protect the environment without material injury to vested water rights. [[75]](#footnote-76)75 Additionally, any such appropriation is junior to existing uses or exchanges, even if those uses and exchanges are not confirmed by decree. [[76]](#footnote-77)76 However, even with statutory instream flow provisions, it is important to recognize that Western Slope recreational industries like fishing guides and rafting companies rely on water flowing *in* streams to the same extent that traditional industries rely on water diverted *from* streams. These recreational industries still have no tool to appropriate or protect their continued use of water within the stream. [[77]](#footnote-78)77

**[\*54]** Despite various shortcomings of the instream flow program, many Western Slope residents embraced the concept. Headwater streams comprised the early focus of the CWCB's instream flow adjudication program. Many Western Slope residents have appeared before the CWCB to support instream flow appropriations. [[78]](#footnote-79)78 Although misconceptions about the priority of instream flows in relation to other senior water rights remain common among lay people, many Western Slope residents recognize the importance of minimum flows to maintain the health of local creeks, streams, and ***rivers***.

Western Slope municipalities are finding that the maturing instream flow program is a mixed blessing. Many towns on the Western Slope are experiencing tremendous growth largely due to healthy recreation, tourism, and resort industries. These newcomers often demand continued flow of water in local streams. Yet, as towns expand and water requirements grow, even relatively junior instream flow rights can present substantial obstacles to the development and protection of municipal water supplies.

B. COMPETING WATER DEMANDS IN THE NEW WEST: THE RUEDI RESERVOIR EXAMPLE

The modern economic and political climate on the Western Slope differs from that of fifty years ago. Water resources incur new demands as needs and perspectives change. Ruedi Reservoir presents a good example of the competing demands for water resources in the New West. Ruedi Reservoir was originally built as the compensatory storage component of the Fryingpan-Arkansas Project, which supplies ***Colorado*** ***River*** basin water to Southeastern ***Colorado***. [[79]](#footnote-80)79 Under Southeastern ***Colorado*** Water Conservancy District decrees, the project can export up to 120,000 acre-feet of water from the ***Colorado*** ***River*** basin in any one year, but must not exceed 69,200 acre-feet per year over a thirty-four year running average. [[80]](#footnote-81)80 The District diverts from the headwaters of the Fryingpan ***River*** and the Hunter Creek drainage to the Eastern Slope through the Boustead Tunnel. [[81]](#footnote-82)81 The operating principles for the project designate fifty-one percent of such water for municipal use and forty-nine percent for agricultural use. [[82]](#footnote-83)82

**[\*55]** Ruedi Reservoir has a total capacity of about 102,000 acre-feet. [[83]](#footnote-84)83 A "regulatory pool" of stored water totaling approximately 55,000 acre-feet is available for use on the Western Slope pursuant to contracts with the United States Bureau of Reclamation. [[84]](#footnote-85)84 A "replacement pool" of approximately 28,000 acre-feet was created for the Southeastern District for augmentation releases. [[85]](#footnote-86)85 The Bureau of Reclamation contracted with many Western Slope water users, including the West Divide and the Basalt Water Conservancy Districts, for water delivery from the regulatory pool. Revenues from these contracts are allocated towards construction, operation, and maintenance costs. [[86]](#footnote-87)86

Despite the seemingly clear purposes of Ruedi Reservoir, people's ideas radically differ as to how it ought to be operated and managed today. As the primary contractual beneficiary of the Fryingpan-Arkansas Project, the Southeastern District naturally wants to see Ruedi Reservoir operated in a manner that maximizes allowable transbasin diversions while remaining consistent with the operating principles for the project. [[87]](#footnote-88)87 The federal government has conflicting mandates. The Bureau of Reclamation, which owns and operates the Reservoir, wants the costs of construction recouped, while the United States Fish and Wildlife Service views Ruedi Reservoir as a large vessel of unused water that could be released for the benefit of endangered fish species. [[88]](#footnote-89)88

Many Western Slope residents, especially those living in the Roaring Fork Valley and ***Colorado*** ***River*** drainage between the Town of Basalt and the Utah border, view Ruedi Reservoir as a source of present and future water supply. These residents struggle to preserve the unused capacity of the reservoir for future Western Slope uses even though present demands for water appear to be fully satisfied. These demands include: the growing Grand Junction metropolitan area; the smaller cities of Palisade, Rifle, Glenwood Springs, Carbondale, and Basalt; and large agricultural interests.

Recreationalists have their own priorities. Flat water boaters want water levels managed to maintain optimum boating conditions, while anglers, on the Frying Pan ***River*** below the dam, seek to limit the maximum rate of release in order to protect wading conditions. Rafting companies and whitewater enthusiasts want consistent flows in the Roaring Fork ***River*** below the reservoir. And finally, a consortium of Eastern and Western Slope water users have proposed a project that would pump water from Ruedi Reservoir back through the Continental Divide delivering more water to the Eastern Slope to **[\*56]** enhance opportunities for diversions on the upper Eagle ***River***. [[89]](#footnote-90)89

Thus, although the facility was ostensibly built to compensate the Western Slope for water exports, the lack of immediate demand for Ruedi water has made it a convenient and susceptible target for radically different purposes.

**VI. CONCLUSION**

The 1969 Act provided a new procedural framework for the adjudication and the administration of water resources in ***Colorado*** while retaining most of the substance of the "pure" prior appropriation system. However, since its enactment thirty years ago, changing values and conditions have prompted some significant relaxation of prior appropriation principles. Small quantities of groundwater can now be produced and used completely outside the priority system. Out-of-priority uses of water are commonplace pursuant to augmentation plans and exchanges which require that senior rights accept replacement sources. Additionally, water rights can now be created in some circumstances without a diversion. Accepted beneficial uses now include the preservation of the natural environment. While calls for basin-of-origin protection will undoubtedly continue, existing laws have been interpreted to provide some limited protections to native water supplies.

Perhaps the greatest threat to the continued viability of the prior appropriation system comes not from Coloradans themselves, but from the federal government. Most lands on ***Colorado***'s Western Slope are owned and managed by the United States Forest Service or the United States Bureau of Land Management. These agencies have not been very successful in acquiring water rights for their various water needs through the reserved rights doctrine. [[90]](#footnote-91)90 This lack of success has led the federal government to explore alternative approaches. The government has attempted to acquire small portions of numerous senior rights from those who divert water on federal lands as a condition for permit renewals for diversion, storage, and conveyance facilities located on federal land. This concept is often referred to as "bypass flows." [[91]](#footnote-92)91

In addition, where a federal nexus exists, the United States Fish and Wildlife Service demands water to increase the flows of the ***Colorado***, the Gunnison, and the Yampa ***Rivers*** for the purpose of recovering four endangered fish species. [[92]](#footnote-93)92 The Fish and Wildlife **[\*57]** Service has recently published a Programmatic Biological Opinion which provides that in exchange for water releases from various sources and other habitat enhancements to benefit the endangered fish in the ***Colorado*** ***River*** reservoir, the Fish and Wildlife Service will agree to allow the development of up to 120,000 additional acre-feet per year. [[93]](#footnote-94)93 Once this amount is consumed, however, any additional water diversion projects that require federal approval will likely be denied unless the appropriator agrees to provide additional water for the endangered fish. [[94]](#footnote-95)94

The distinct possibility of limited federal control over water resources allocation in Western ***Colorado*** which is presented by concepts such as bypass flow requirements and the Endangered Species Act [[95]](#footnote-96)95 is perhaps the prior appropriation system's greatest threat. Will the system endure? Although the 1969 Act was primarily intended to codify and continue a century-old system, the first thirty years since passage of the Act have shown that the system has a capacity for change which may be essential to its preservation.

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1. 1 [***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 (1999). [↑](#footnote-ref-2)
2. 2 For instance, the Act contained a provision allowing changes in location or use of conditional water rights. "The term 'change of water right' includes changes of conditional water rights as well as changes of water rights." [***COLO.*** *REV. STAT. § 37-92-103(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1999). [↑](#footnote-ref-3)
3. 3 [***COLO.*** *REV. STAT. §§ 37-92-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FS-00000-00&context=1516831), -203 (1999). [↑](#footnote-ref-4)
4. 4 *Id.* § 37-92-202. According to Anthony W. Williams, Esq., a water attorney who practices in Grand Junction, prior to the 1969 Act, the state engineer did not participate in water rights adjudications on the Western Slope. Interview with Anthony W. Williams, Esq., ***Colorado*** Water Attorney (Oct. 29, 1999). [↑](#footnote-ref-5)
5. 5It is the policy of this State to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all the waters of this State." [***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) (1999). [↑](#footnote-ref-6)
6. 6 Western Slope entities were not significantly involved in drafting of the provisions of the 1969 Act which affected groundwater administration. Interview with Anthony W. Williams, Esq., ***Colorado*** Water Attorney (Oct. 29, 1999). An article in the Sunday, June 8, 1969 edition of the Grand Junction Daily Sentinel merely mentions that "thirty one legislative bills including . . . the act revising the state's water laws were signed Saturday morning by Governor John A. Love." Gordon G. Gauss, *31 State Bills Signed by Love*, DAILY SENTINEL (***Colo.***), June 8, 1969, at [*4*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831)A. [↑](#footnote-ref-7)
7. 7 According to Orlyn Bell, Division Engineer for Water Division Number 5, the ***Colorado*** ***River*** became over-appropriated in 1981. The Engineer cited a letter dated May 22, 1981 from ***Colorado*** State Engineer Jeris Danielson to Water Division Number 5 Division Engineer Lee Enewold. The letter declared that the ***Colorado*** ***River*** and its tributaries, including the Roaring Fork and Eagle ***Rivers***, had become over-appropriated above Cameo, which constitutes the point of diversion for the Grand Valley Irrigation Canal owned by the Grand Valley Irrigation Company. Interview with Orlyn Bell, Division Engineer for Water Division Number 5, Glenwood Springs, ***Colo.*** (Oct. 22, 1999). According to Water Division Number 4 Division Engineer, Wayne Schieldt, the Gunnison ***River*** was considered over-appropriated in August 1984. During this month the division engineer first established a "critical stream list" for the Gunnison ***River***. Interview with Wayne Schieldt, Division Engineer for Water Division Number 4 (Oct. 24, 1999). According to Bob Plaska, Division Engineer for Water Division Number 6, the main stem of the Yampa ***River*** has never been under administration, although some side tributaries are administered on a regular basis. Interview with Bob Plaska, Division Engineer for Water Division Number 6 (Oct. 26, 1999). [↑](#footnote-ref-8)
8. 8 *See* [***COLO.*** *REV. STAT. § 37-92-602*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:662M-XJW3-CGX8-03F8-00000-00&context=1516831) (1999). [↑](#footnote-ref-9)
9. 9 Water Division Number 5 encompasses the ***Colorado*** ***River*** drainage basin, the White ***River*** and all of the ***Colorado*** ***River***'s tributaries arising in ***Colorado*** except the Gunnison ***River***. *See id.* § 37-92-201(1)(e). [↑](#footnote-ref-10)
10. 10 Interview with Orlyn Bell, Division Engineer for Water Division Number 5, Glenwood Springs, ***Colo.*** (Oct. 22, 1999). [↑](#footnote-ref-11)
11. 11 *Id.* [↑](#footnote-ref-12)
12. 12 Interview with William Lorah, P.E., Consulting Engineer for Wright Water Engineers, Inc., Glenwood Springs, ***Colo.*** (Oct. 29, 1999). [↑](#footnote-ref-13)
13. 13 *Id.* [↑](#footnote-ref-14)
14. 14The position of the applicants is the same as if they sought to take surface waters which were already appropriated and needed. . . . Under the present state of technology to drill but not use a well in order to establish a priority date would be a vain and futile procedure." [*Hall v. Kuiper, 510 P.2d 329, 332 (****Colo.*** *1973).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1RJ0-003D-94J0-00000-00&context=1516831) [↑](#footnote-ref-15)
15. 15 Interview with Orlyn Bell, Division Engineer for Water Division Number 5, Glenwood Springs, ***Colo.*** (Oct. 22, 1999). [↑](#footnote-ref-16)
16. 16We have consistently held that a conditional water right to divert water which would injure senior appropriators may not be decreed except in conjunction with a plan for augmentation assuring enough available water to exercise the right." [*Fox v. Division Eng'r for Water Div. No. 5, 810 P.2d 644, 645 (****Colo.*** *1991).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0MN0-003D-929G-00000-00&context=1516831) [↑](#footnote-ref-17)
17. 17 [*Kuiper, 510 P.2d at 329.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1RJ0-003D-94J0-00000-00&context=1516831) [↑](#footnote-ref-18)
18. 18 [*Fellhauer v. People, 447 P.2d 986 (****Colo.*** *1968).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1Y50-003D-90XB-00000-00&context=1516831) [↑](#footnote-ref-19)
19. 19 *See* [***COLO.*** *REV. STAT. §§ 37-92-602(1)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:662M-XJW3-CGX8-03F8-00000-00&context=1516831) to (e), -602(3)(b)(II)(A) (1999). The General Assembly passed House Bill 1160, which provided for certain wells to be exempt from the priority system as administered pursuant to the 1969 Act. *See* Act of May 22, 1971, ch. 378, § 1, 1971 ***Colo.*** Sess. Laws 1341. Less than a year later, the ***Colorado*** Legislature passed House Bill 1042, which further amended the exemption to the 1969 Act by including a presumption of non-injury for certain small wells. The Act dictates "there shall be a presumption that there will not be material injury to the vested water rights of others or to any other existing well resulting from such well, which presumption may be rebutted by evidence sufficient to show material injury." *See* Act of May 8, 1972, ch. 105, § 2, 1972 ***Colo.*** Sess. Laws 629, 630. It is important to note that these "exempt wells" are not completely exempt from the prior appropriation system. The Act specifies that the limitations on use of these wells merely create a rebuttable presumption of non-injury. If injury to downstream senior water users can be demonstrated, the state and division engineers must deny the well permit. [***COLO.*** *REV. STAT. § 37-92-602(3) (b)(II)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:662M-XJW3-CGX8-03F8-00000-00&context=1516831) (1999). This presumption of non-injury is probably what saves the exempt well statute from a challenge that exempt wells violate article XVI, section 6 of the ***Colorado*** Constitution, which provides that "the right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied." ***COLO.*** CONST. art. XVI, § 6. [↑](#footnote-ref-20)
20. 20 The three types of exempt wells are as follows: *In-house Use Only*: These permits are given to lot owners who do not have more than thirty-five acres and whose lots were created prior to 1972. This allows some owners of small parcels to develop their property but restricts the use of water to in-houses use only; *35-Acre Wells*: One who owns thirty-five acres or more is entitled to an exempt well which can service up to three single-family dwellings, irrigate one acre of lawns and gardens and provide water for domestic livestock; and *Commercial Exempt*: Parcels of property, which meet the above criteria but are used for commercial purposes, can also obtain exempt wells in limited circumstances. The uses of the water are very limited and are largely controlled by policy statements issued by the State Engineer's Office. *See* [***COLO.*** *REV. STAT. §§ 37-92-602(1)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:662M-XJW3-CGX8-03F8-00000-00&context=1516831), -602(1)(b), -602(3)(b)(II)(A), -602(1)(c) (1999). [↑](#footnote-ref-21)
21. 21 *See id.* § 37-92-602(1)(b) to (c). However, the 1969 Act excepts wells in operation prior to May 22, 1971 used for ordinary household purposes by no more than three single-family dwellings, for fire protection, stock watering and irrigating no more than one acre. These wells can pump up to fifty gallons per minute. *See id.* § 37-92-602(1)(e). [↑](#footnote-ref-22)
22. 22 *Id.* § 37-92-602(3)(b)(II)(A). [↑](#footnote-ref-23)
23. 23 Title 37, chapter 92, section 306 of the ***Colorado*** Revised Statutes allows for the date of appropriation, as opposed to the date of adjudication, to serve as the priority date for wells adjudicated prior to July 1, 1972. This recognized that wells were not generally adjudicated prior to passage of the 1969 Act. [***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) (1999). [↑](#footnote-ref-24)
24. 24 ***COLO.*** CONST. art. XVI, § 6. [↑](#footnote-ref-25)
25. 25 *See* [*Strickler v.* ***Colorado*** *Springs, 26 P. 313, 318 (****Colo.*** *1891);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRR-2N10-0040-025T-00000-00&context=1516831) [*Black v. Taylor, 264 P.2d 502, 506 (****Colo.*** *1953).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-XFW0-0040-03G4-00000-00&context=1516831) [↑](#footnote-ref-26)
26. 26 *Cf.* [*Shirola v. Turkey Canon Ranch Ltd. Liab. Corp., 937 P.2d 739 (****Colo.*** *1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YS70-003D-90DV-00000-00&context=1516831) (addressing standing of owners of exempt wells to assert injury in water rights proceeding but did not involve challenge to statutory presumption of non-injury for exempt wells). [↑](#footnote-ref-27)
27. 27 [***COLO.*** *REV. STAT. § 37-92-602(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:662M-XJW3-CGX8-03F8-00000-00&context=1516831) (1999). [↑](#footnote-ref-28)
28. 28The original priority date of any such well may be awarded regardless of the date of application therefor." *Id.* [↑](#footnote-ref-29)
29. 29 ***COLO.*** CONST. art. XVI, § 6; [*Shirola, 937 P.2d at 744.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX3-YS70-003D-90DV-00000-00&context=1516831) [↑](#footnote-ref-30)
30. 30 *See* Act of July 18, 1975, ch. 274, § 2, 1975 ***Colo.*** Sess. Laws 1002, 1003 (adding subsection prohibiting use of exempt wells in subdivisions). [↑](#footnote-ref-31)
31. 31A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or decreed conditional right." Water Right Determination and Administration Act of 1969, ch. 373, § 1, 1969 ***Colo.*** Sess. Laws 1200, 1207 (codified as amended at [***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) (1999)). [↑](#footnote-ref-32)
32. 32 [***COLO.*** *REV. STAT. § 37-92-103(9)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1999) (emphasis added). [↑](#footnote-ref-33)
33. 33 *See, e.g.*, David L. Harrison & Gustave Sandstrom, Jr., Project, *The Groundwater-Surface Water Conflict and Recent* ***Colorado*** *Water Legislation*, 43 U. ***COLO.*** L. REV. 1, 38-39 (1971). [↑](#footnote-ref-34)
34. 34 *See* [***COLO.*** *REV. STAT. § 37-92-103(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1999). [↑](#footnote-ref-35)
35. 35 *See id.* According to Anthony W. Williams, Esq., the debates over the 1969 Act showed that one of the few substantive changes to water law embodied in the Act was the provision allowing changes in the location or in the use of conditional, as opposed to absolute, water rights. Interview with Anthony W. Williams, Esq., ***Colorado*** Water Attorney (Oct. 29, 1999). [↑](#footnote-ref-36)
36. 36 *See* [***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) (1999). [↑](#footnote-ref-37)
37. 37 *See infra* Parts IV and V for a more thorough discussion of some of these storage facilities. [↑](#footnote-ref-38)
38. 38 ***COLO.*** CONST. art. XVI, § 5. [↑](#footnote-ref-39)
39. 39 Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. [***COLO.*** *REV. STAT. § 37-82-106(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J372-00000-00&context=1516831) (1999). [↑](#footnote-ref-40)
40. 40 For example, Representatives Smith, Reeser and George introduced House Bill 1288 in the 61st General Assembly. This bill also included proposals regarding statewide water planning, but was withdrawn because of a lack of consensus. Whether basin-of-origin legislation would be constitutional and could coexist with the prior appropriation doctrine is subject to debate. H.R. 1288, 61st Leg., 2nd Regular Sess. (***Colo.*** 1998). [↑](#footnote-ref-41)
41. 41 [***COLO.*** *REV. STAT. §§ 37-45-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J2M9-00000-00&context=1516831) to -153 (1999). [↑](#footnote-ref-42)
42. 42 *Id.* § 37-45-102(1). [↑](#footnote-ref-43)
43. 43 *Id.* § 37-45-102(2)(a). [↑](#footnote-ref-44)
44. 44 *Id.* § 37-45-181(1)(b)(II) (emphasis added). [↑](#footnote-ref-45)
45. 45 Green Mountain Reservoir is an example of a compensatory storage facility. It was built to compensate the Western Slope for impacts from the ***Colorado*** Big Thompson Project, which is a United States Bureau of Reclamation project that diverts water from the ***Colorado*** ***River*** basin to Northeastern ***Colorado*** for irrigation of lands within the Northern ***Colorado*** Water Conservancy District. The availability of water stored in Green Mountain Reservoir has greatly enhanced water development possibilities on the main stem of the ***Colorado*** ***River***. *See generally* Interior Department Appropriation Act, ch. 570, [*50 Stat. 564, 595 (1937).*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CBP-FXR0-01XN-S249-00000-00&context=1516831) [↑](#footnote-ref-46)
46. 46 Some previous attempts at basin-of-origin legislation have sought to extend the protections contained in the Water Conservancy Act to other appropriators. *See, e.g.*, H.R. 1288, 61st Leg., 2nd Regular Sess. (***Colo.*** 1998). [↑](#footnote-ref-47)
47. 47 Interview with Anthony W. Williams, Esq., ***Colorado*** Water Attorney (Oct. 29, 1999). Williams participated in the debates over the 1969 Act. [↑](#footnote-ref-48)
48. 48 Interview with Eric Kuhn, Secretary-Engineer for the ***Colorado*** ***River*** Water Conservation District, Glenwood Springs, ***Colo.*** (Oct. 25, 1999). [↑](#footnote-ref-49)
49. 49 [***COLO.*** *REV. STAT. §§ 24-65.1-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WVF1-DYDC-J408-00000-00&context=1516831) to -502 (1999). [↑](#footnote-ref-50)
50. 50 [*City & County of Denver v. Board of County Comm'rs, 782 P.2d 753 (****Colo.*** *1989).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0V30-003D-93Y7-00000-00&context=1516831) [↑](#footnote-ref-51)
51. 51 [*Id. at 755-56.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0V30-003D-93Y7-00000-00&context=1516831) [↑](#footnote-ref-52)
52. 52 [***Colorado******River*** *Water Conservation Dist. v. Vidler Tunnel Water* ***Co****., 594 P.2d 566 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-53)
53. 53 [*Id. at 568.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F60-003D-928V-00000-00&context=1516831) [↑](#footnote-ref-54)
54. 54 [***COLO.*** *REV. STAT. § 37-92-305(9)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G3-00000-00&context=1516831) (1999). [↑](#footnote-ref-55)
55. 55 *Id.* [↑](#footnote-ref-56)
56. 56 *See, e.g.*, [*Southeastern* ***Colorado*** *Water Conservancy Dist. v. City of Florence, 688 P.2d 715, 718 (****Colo.*** *1984).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-14T0-003D-90HV-00000-00&context=1516831) [↑](#footnote-ref-57)
57. 57 *See, e.g.*, [*FWS Land & Cattle* ***Co****. v.* ***Colorado*** *Div. of Wildlife, 795 P.2d 837, 840 (****Colo.*** *1990).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0RC0-003D-9353-00000-00&context=1516831) [↑](#footnote-ref-58)
58. 58 [*Board of County Comm'rs v. United States, 891 P.2d 952 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-59)
59. 59 [*Id. at 961.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-02X0-003D-92Y7-00000-00&context=1516831) [↑](#footnote-ref-60)
60. 60 ***Colorado*** had 20.8 million pleasure visitors in 1997, making it the third most popular destination among the fifty states. ***Colorado***'s tourism industry accounts for $ 7.1 billion in revenue and for 112,000 jobs with a total payroll of $ 1.5 billion. Approximately thirty-six percent of tourism dollars are spent in the mountain resort region. *See* LONGWOODS INT'L, ***COLORADO*** TOURISM STRATEGIC MARKETING PLAN: 1999/2000 1 (1999). [↑](#footnote-ref-61)
61. 61 2 GEORGE VRANESH, ***COLORADO*** WATER LAW, § 6.7, at 700 (1987). [↑](#footnote-ref-62)
62. 62 ***COLO.*** REV. STAT. § 148-21-3(6) (Supp. 1969). [↑](#footnote-ref-63)
63. 63 [***Colorado******River*** *Water Conservation Dist. v. Rocky Mtn. Power* ***Co****., 406 P.2d 798, 800 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-64)
64. 64 Act of Apr. 23, 1973, ch. 442, §§ 1-3, 1973 ***Colo.*** Sess. Laws 1521, 1521-22. [↑](#footnote-ref-65)
65. 65 [***COLO.*** *REV. STAT. §§ 37-60-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J31N-00000-00&context=1516831) to -130 (1999). The ***Colorado*** Water Conservation Board consists of a fifteen member board chosen from various geographic areas in the State. *Id.* § 37-60-104. In 1937, the legislature created the board for the purpose of "aiding in the protection and development of the state for the benefit of the present and future inhabitants of the state." *Id.* § 37-60-102. [↑](#footnote-ref-66)
66. 66 [***COLO.*** *REV. STAT. § 37-92-103(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1973). [↑](#footnote-ref-67)
67. 67 ***COLO.*** REV. STAT. § 148-2-3(6) (Supp. 1969) (emphasis added). [↑](#footnote-ref-68)
68. 68 [***COLO.*** *REV. STAT. § 37-92-103(3)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (1999). [↑](#footnote-ref-69)
69. 69 *Id.* § 37-92-103(4). [↑](#footnote-ref-70)
70. 70 *See* [***Colorado******River*** *Water Conservation Dist. v.* ***Colorado*** *Water Conservation Bd., 594 P.2d 570, 575 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) Immediately after the ***Colorado*** Water Conservation Board began to implement Senate Bill 97, the ***Colorado*** ***River*** Water Conservation District challenged the constitutionality of an instream flow appropriation on the Crystal ***River***. The ***Colorado*** Supreme Court ultimately ruled that Senate Bill 97 was constitutional. *See* id. at 577. Prior to the enactment of statutory instream flow provisions, the ***Colorado*** Supreme Court had ruled that the attempted appropriation of a minimum stream flow by the ***Colorado*** ***River*** Water Conservation District was unconstitutional because no diversion of any portion of the water would take place. [***Colorado******River*** *Water Conservation Dist. v. Rocky Mtn. Power* ***Co****., 406 P.2d 798, 800 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 2 VRANESH, *supra* note 61, § 6.7, at 701. [↑](#footnote-ref-72)
72. 72 Act of June 23, 1981, ch. 431, § 1, 1981 ***Colo.*** Sess. Laws 1784. [↑](#footnote-ref-73)
73. 73 [***COLO.*** *REV. STAT. § 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (1999). [↑](#footnote-ref-74)
74. 74 *Id.* [↑](#footnote-ref-75)
75. 75 *Id.* § 37-92-102(3)(c). [↑](#footnote-ref-76)
76. 76 *Id.* § 37-92-102(3)(b). [↑](#footnote-ref-77)
77. 77 *Cf.* [*City of Thornton v. City of Fort Collins, 830 P.2d 915, 930-31 (****Colo.*** *1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) (holding in relevant part that it is not essential to a valid appropriation that water be diverted *from* it natural streambed but that a valid appropriation can be made by *controlling* water within its natural course for, among other things, recreational purposes). [↑](#footnote-ref-78)
78. 78 Interview with Eric Kuhn, Western Slope ***Colorado*** Water Conservation Board Member and Secretary-Engineer for the ***Colorado*** ***River*** Water Conservation District, Glenwood Springs, ***Colo.*** (Oct. 25, 1999). [↑](#footnote-ref-79)
79. 79 Fryingpan-Arkansas Project--***Colorado***, Pub. L. No. 87-590, [*76 Stat. 389 (1962)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CCB-R1T0-01XN-S4B8-00000-00&context=1516831) (codified as amended at [*43 U.S.C. §§ 616*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73NR-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)[*16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T632-8T6X-732T-00000-00&context=1516831)f (1994)). The operating principles for the Fryingpan-Arkansas Project are set forth in House of Representatives Document 130, 87th Cong., 2nd Sess., adopted by the State of ***Colorado*** on August 16, 1972. Pub. L. No. 87-590, § 3(a), [*76 Stat. 389, 391 (1962).*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CCB-R1T0-01XN-S4B8-00000-00&context=1516831) [↑](#footnote-ref-80)
80. 80 Interview with Steve Arveschaug, General Manager of the Southeastern ***Colorado*** Water Conservancy District (November 12, 1999). [↑](#footnote-ref-81)
81. 81 *Id.* [↑](#footnote-ref-82)
82. 82 *Id.* [↑](#footnote-ref-83)
83. 83 *Id.* [↑](#footnote-ref-84)
84. 84 *Id.* [↑](#footnote-ref-85)
85. 85 *Id.* [↑](#footnote-ref-86)
86. 86 The Southeastern District is responsible for approximately twenty percent of such costs. Interview with Steve Arveschaug, General Manager of the Southeastern ***Colorado*** Water Conservancy District (November 12, 1999). [↑](#footnote-ref-87)
87. 87 *Id.* [↑](#footnote-ref-88)
88. 88 *See* discussion *infra* Part VI. [↑](#footnote-ref-89)
89. 89 Heather McGregor, *Ruedi Studied for Water Diversion*, GLENWOOD INDEPENDENT (***Colo.***), October 18, 1999, at 1,7. [↑](#footnote-ref-90)
90. 90 *See, e.g.*, [*United States v. New Mexico, 438 U.S. 696 (1978).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8PR0-003B-S194-00000-00&context=1516831) [↑](#footnote-ref-91)
91. 91 *See generally* Thomas. K Snodgrass, *Bypass Flow Requirements and the Question of Forest Service Authority*, [*70 U.* ***COLO.*** *L. REV. 641, 652-56 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3VTY-4TR0-00CV-N01Y-00000-00&context=1516831) [↑](#footnote-ref-92)
92. 92 The ***Colorado*** Water Conservation Board sought minimum stream flows on the ***Colorado*** and the Gunnison ***Rivers***. Application for Water Rights to Protect the Natural Environment to a Reasonable Degree, Case No. 95-CW-296 (***Colo.*** Water Ct., Div. No. 5, Dec. 25, 1995); Application for Water Rights to Protect the Natural Environment to a Reasonable Degree, Case No. 95-CW-297 (***Colo.*** Water Ct., Div. No. 5, Dec. 25, 1995). Additionally, it sought instream flows on the Yampa ***River***. Application for Water Rights to Protect the Natural Environment to a Reasonable Degree, Case No. 95-CW-155 (***Colo.*** Water Ct., Div. No. 6, Dec. 25, 1995); Application for Water Rights to Protect the Natural Environment to a Reasonable Degree, No. 95-CW-156 (***Colo.*** Water Ct., Div. No. 6, Dec. 25, 1995). As part of the multi-state program to recover these endangered fish, the ***Colorado*** Water Conservation Board attempted to adjudicate instream flows for the benefit of the endangered fish in the ***Colorado*** ***River***. They sought an amount equal to the entire remaining flow of the ***Colorado*** ***River*** less a "carve out" of 100,000 acre-feet per year. The state's remaining share of ***Colorado*** ***River*** Compact water is about 1.5 million acre-feet per year. The practical result of the ***Colorado*** Water Conservation Board's filings would have been the reduction of ***Colorado*** ***River*** water available for future development within the State from 1.5 million acre-feet to 100,000 acre-feet. The mechanism for allocating the "carve out" was never clarified, and the applications were voluntarily dismissed by the ***Colorado*** Water Conservation Board. However, many Western Slope water users predicted that this would convert the prior appropriation system to a permit system with the United States Fish and Wildlife or its surrogate deciding who would receive a share of the carve out. The ***Colorado*** Water Conservation Board is widely expected to file new instream flow applications by December 31, 2000. [↑](#footnote-ref-93)
93. 93 U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE, MOUNTAIN-PRAIRIE REGION, DRAFT PROGRAMMATIC BIOLOGICAL OPINION FOR BUREAU OF RECLAMATION'S OPERATIONS AND DEPLETIONS, OTHER DEPLETIONS, AND FUNDING AND IMPLEMENTATION OF RECOVERY PROGRAM ACTIONS IN UPPER ***COLORADO*** ***RIVER*** ABOVE THE CONFLUENCE OF THE GUNNISON ***RIVER*** 2 (October 25, 1999) [hereinafter FWS DRAFT PROGRAMMATIC BIOLOGICAL OPINION]. [↑](#footnote-ref-94)
94. 94 The authors' assertion that any further water development will be subject to federal approval is an inference from the Fish and Wildlife Service's Draft Biological Opinion. *See generally* FWS DRAFT PROGRAMMATIC BIOLOGICAL OPINION, *supra* note 95. [↑](#footnote-ref-95)
95. 95 Endangered Species Act of 1973, [*16 U.S.C. §§ 1531*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S8T-0KG2-8T6X-707Y-00000-00&context=1516831)-1544 (1994). [↑](#footnote-ref-96)