Protecting River Flows for Fun and Profit: Colorado's Unique Water Rights for Whitewater Parks

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Protecting River Flows for Fun and Profit: Colorado’s Unique Water Rights for Whitewater Parks

Reed D. Benson*

Since 2001, Colorado has recognized a special type of water right for whitewater parks, which are constructed within a river channel to provide play features for kayakers and other boaters. These water rights, called “recreational in-channel diversions,” are unique to Colorado, even though whitewater parks exist in several western states. This Article addresses some of the underlying reasons that recreational in-channel diversions were established in Colorado, and traces the controversy surrounding their recognition by that state’s courts and legislature. Over the last decade, however, the controversy has largely died away, and whitewater park rights have now become an accepted part of Colorado water law. This Article reviews these developments, examines the policy choices made by the legislature in enacting two different statutes on recreational in-channel diversions, and offers concluding observations regarding Colorado’s experience with whitewater park water rights.

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INTRODUCTION

Colorado enacted a statute in 2001\(^1\) recognizing a special type of water right for whitewater parks, which are designed and constructed to provide waves and holes for playboating\(^2\) at a variety of river flow levels. These rights are essentially instream flow rights that call for specified flows through the constructed course, at levels that provide a fun experience for kayakers and other boaters using the park. Unlike more familiar instream flow rights for environmental purposes, however, these specialized rights involve diversion or control of water using engineered structures in the river channel, and it is these structures that produce the park’s whitewater features. These special rights, called recreational in-channel diversions (RICDs), are unique to Colorado;\(^3\) nearly fifteen years after its legislature recognized these rights, no other state has followed suit.

Whitewater park rights were the subject of intense legal and policy debates in Colorado for several years. The legitimacy and size of water right claims for these courses was fiercely litigated in that state’s unique water courts both before and after the 2001 statute. On one side of the fight were local governments and water districts that sought to appropriate water for their whitewater parks; on the other was a state agency, the Colorado Water Conservation Board (CWCB), that fought to defeat or reduce these appropriations. Twice the issue reached the Colorado Supreme Court, once ending in a three-to-three deadlock. Years after the original RICD statute was enacted, the dispute returned to the Colorado legislature, which enacted significant revisions to the law in 2006.\(^4\)

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\(^{1}\) See infra Part II.B.

\(^{2}\) Waves and holes are features of a flowing stream that attract whitewater boaters by offering certain kinds of action or thrills that are not provided by calm, flat water. Certain waves or holes can deliver a particularly fun experience for boaters, especially those who are highly skilled. Boaters generally call such features “play spots,” and engineered whitewater parks are built to provide readily accessible play spots that are fun at various flow levels. “Playboating” is a form of whitewater paddling that involves “surfing” and performing various other moves at play spots; some playboaters rarely go downriver at all, instead spending all their time at an easily accessible play spot. Whitewater parks facilitate this kind of playboating, often called “park and play.”

\(^{3}\) “Colorado is the only state that allows for the appropriation of water rights for recreational boating uses associated with man-made whitewater parks, specifically requiring structures in the stream that create recreational experiences.” COLO. WATER CONSERVATION BD., COLORADO’S WATER PLAN 245 (2015), https://www.colorado.gov/pacific/sites/default/files/FINAL-2ndDraftClean-Appendices-2015%20Revised.pdf (second draft).

\(^{4}\) A 2007 article told the “inside story” of these early battles from the perspective of those fighting to establish and defend whitewater park rights. Glenn E. Porzak et al., Recreation Water Rights: “The
As these debates raged on in the early years of the twenty-first century, it seemed reasonable to conclude, as the Colorado Foundation for Water Education did in 2004, "that the controversy over recreational in-channel diversions will continue."\(^5\) The record shows, however, that the controversy has all but died over the past decade. Today, several whitewater parks in Colorado have established water rights, but very few new claims are being filed. Whereas some of the early RICD appropriations were secured only after hard-fought trials in the water courts, these claims have more recently been approved on the basis of negotiated settlements between RICD claimants and objecting parties. And since enacting compromise amendments to the RICD statute in 2006, the legislature has not returned to this issue. In short, after a turbulent beginning, whitewater park water rights have become an established and accepted part of Colorado water law.

RICDs are unique to Colorado, but whitewater parks are not. In other words, only one state allows whitewater parks to appropriate the water they need to function. Colorado has long been a leader in the development of western water law, and the acceptance of whitewater park water rights there suggests that other states should consider following Colorado’s lead on this issue.

Colorado’s experience with these special water rights offers potentially relevant lessons for other western states with important recreational rivers. First, Colorado recognized these high-volume water rights even as it was facing the need to develop additional water supplies for its growing cities in the twenty-first century. Second, Colorado came to recognize these water rights because it believes in the right of users to appropriate all available water, and gives limited roles to state agencies and little weight to policy arguments in the determination of water rights. Third, the Colorado legislature made important policy choices in setting the legal framework for whitewater park rights, recognizing RICDs, imposing some key restrictions, and rejecting others. Fourth, the acceptance of RICDs after years of initial controversy suggests that other western states should consider allowing whitewater parks to obtain water rights on terms similar to those of Colorado.

Part I of this Article summarizes consumptive and nonconsumptive water uses in Colorado and briefly outlines the state’s water laws and institutions as they relate to new appropriations. Part II traces Colorado’s recognition of water rights for whitewater parks in the courts and the legislature, focusing largely on the role of the CWCB and the policy choices of the legislature as expressed in the 2001 and 2006 statutes. Part III examines the status of RICD issues in Colorado today, and Part IV offers concluding observations regarding Colorado’s experience.

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I. WATER USES AND WATER LAW IN COLORADO

Fifteen years after the enactment of the original RICO statute, Colorado remains the only state to recognize appropriations for whitewater boating courses. Colorado has been called the “Mother of Rivers,” but why did it become the birthplace of a unique type of recreational water right? The reasons have to do partly with Colorado’s economy and values, but also with some unusual aspects of its water laws and institutions.

A. Consumptive and Nonconsumptive Water Uses in Colorado

The dominant consumptive water use in Colorado, dwarfing all others combined, is irrigation. According to the U.S. Geological Survey (USGS), irrigation accounted for nearly 89 percent of Colorado’s water withdrawals in 2010. The percentage is the same in terms of water actually consumed. The share of Colorado’s water used for irrigation seems especially high given that the great majority of Coloradans live in cities, and that agriculture accounts for a tiny fraction of Colorado’s economy.

Colorado’s second highest water use is public water supply, including water delivered for use in cities and towns. Public water suppliers used about 950,000

7. MOLLY A. MAUPIN ET AL., U.S. GEOLOGICAL SURVEY, ESTIMATED USE OF WATER IN THE UNITED STATES IN 2010, at 11 (2014), http://pubs.usgs.gov/circ/1405/pdf/circ1405.pdf (10.9 million acre-feet of irrigation withdrawals out of a total of 12.3 million acre-feet). By contrast, aquaculture and self-supplied industrial uses each accounted for just over one percent of withdrawals, while power plants and self-supplied domestic uses combined for around 1 percent. Id.
8. COLO. WATER CONSERVATION BD., supra note 3, at 79. Not all of the water withdrawn from a river or aquifer for a particular use is actually consumed by that use. The USGS defines “consumptive use” (or water consumed) as “The part of water withdrawn that is evaporated, transpired, incorporated into products or crops, consumed by humans or livestock, or otherwise removed from the immediate water environment.” MAUPIN ET AL., supra, at 49.
10. According to the Department of Commerce, the “Agriculture, Forestry, Fishing, and Hunting” sector accounted for slightly less than 1.2 percent of Colorado’s economic output in 2013. Current-Dollar GDP by State: Colorado (2013), BUREAU ECON. ANALYSIS, http://www.bea.gov/iTable/itable.cfm?ReqID=70&step=1&isuri=1 (last visited Sept. 24, 2015) (click “Gross Domestic Product (GDP) by State” tab; then follow “GDP in current dollars” hyperlink; then follow “Next Step” hyperlink; then follow “Next Step” hyperlink; then select “Colorado” under “Area” and follow “Next Step” hyperlink; then select “2013” under “Year” and follow “Next Step” hyperlink) (showing output for this sector of slightly above $3 billion as of the end of 2013, while the total state Gross Domestic Product was slightly below $300 billion).
11. According to the CWCB, public water supply accounts for around 8 percent of water consumed in Colorado. See COLO. WATER CONSERVATION BD., supra note 3, at 79. USGS figures for public water supply cover “water withdrawn by public and private water suppliers that provide water to at least twenty-
acre-feet\(^\text{12}\) in 2010, accounting for nearly 8 percent of Colorado’s water withdrawals,\(^\text{13}\) and serving 94 percent of its population.\(^\text{14}\) According to the USGS, Colorado’s public water suppliers used almost 6 percent less water in 2010 than in 2000, even though they served nearly a million more people.\(^\text{15}\) Going forward, however, Colorado’s municipal and industrial water demands are projected to grow to around 1.4 million acre-feet by 2035 and potentially exceed 1.8 million acre-feet by 2050—nearly double current levels—depending on the magnitude of population growth and climate change.\(^\text{16}\)

Nonconsumptive water uses such as fishing, birdwatching, and recreational boating are harder to quantify,\(^\text{17}\) but are certainly important activities nearly everywhere in Colorado.\(^\text{18}\) The CWCB says that local water plans have identified 13,557 miles of streams as environmental or recreational “focus areas,”\(^\text{19}\) although even this total may be low.\(^\text{20}\) These uses have significant economic value for the state, as summarized in the CWCB’s draft Colorado Water Plan:

The importance of Colorado’s natural environment and recreational opportunities to its quality of life and to its economy cannot be overstated. Outdoor recreation (including hunting, fishing, biking, hiking, skiing, golfing, wildlife watching and many other types of outdoor activities) significantly contributes to Colorado’s economy, with nonconsumptive

\(^{12}\) An acre-foot is a unit of volume; the amount of water needed to cover an acre of land one foot deep. An acre-foot is equivalent to 325,851 gallons or 43,560 cubic feet. \(\text{Maupin et al., supra note 7, at iv.}\)

\(^{13}\) \(\text{Id. at 11.}\)

\(^{14}\) \(\text{Id. at 19.}\)

\(^{15}\) \(\text{Id. (848 million gallons per day to serve 4.72 million people in 2010); Susan S. Hutson et al., U.S. Geological Survey, Circular No. 1268, Estimated Use of Water in the United States in 2000, at 14 (2004) (899 million gallons per day to serve 3.75 million people in 2000).}\)

\(^{16}\) \(\text{Colo. Water Conservation Bd., supra note 3, at 80 fig.5-2 (showing low, medium, and high demand for municipal and industrial water use in 2050 “with range of climate change increases”). Colorado officials project the state’s population of 5.2 million will grow to more than 8 million, potentially even exceeding 10 million, by 2050. Colo. Water Conservation Bd., Colorado’s Water Supply Future 4-3 (2011), http://cwcb.state.co.us/water-management/water-supply-planning/Documents/SWS12010/SWSI2010.pdf.}\)

\(^{17}\) The USGS does not include estimates for nonconsumptive water uses in its quinquennial reports on water use in the United States. \(\text{Maupin et al., supra note 7, at 50 (defining instream use and noting that past reports had included estimates for water used for hydropower, but that this was discontinued after the 2000 report).}\)

\(^{18}\) \(\text{Colo. Water Conservation Bd., supra note 3, at 137 (summarizing locally-developed water resource plans from each of Colorado’s major river basins, and noting that every one of these plans has “indicated that meeting [the basin’s] environmental and recreational needs is an important aspect” of the plan). The CWCB notes “[w]ater is a crucial element in maintaining the environmental and recreational values important to Coloradans. Adequate streamflows support the outstanding fisheries in the upper Arkansas River, rafting through Glenwood Canyon [on the Colorado River], snowmaking for world-class ski areas, and maintaining habitat for the water-dependent natural environment.” Id. at 242.}\)

\(^{19}\) \(\text{Id. at 137-39.}\)

\(^{20}\) The criteria for being named a “focus area” were presence of cutthroat trout, warm water fish, or important “riparian and wetland areas.” \(\text{Id. at 137-38.}\) However, other factors, such as brown trout or whitewater boating, might make a stream reach significant for recreational use.
water-based recreation an important part of that economy. Healthy watersheds, rivers and streams, and wildlife are vital to maintaining Colorado's quality of life and a robust economy.21

While the total economic value of water-based recreation is difficult to quantify, it certainly generates significant dollars for Colorado. According to a 2012 report by the nonprofit group Protect the Flows,22 recreational activities along Colorado's western slope rivers and streams produced over $6 billion in direct spending in 2011 with a total economic output approaching $10 billion.23 Since these figures cover only the Colorado River and its tributaries,24 they certainly understate the statewide economic impact by leaving out some of Colorado's most important recreational rivers; for example, the Arkansas has been called the most rafted river in the world.25 The economic benefits of water-dependent recreation are most significant for communities such as Glenwood Springs, Gunnison, and Salida located along rivers that are tremendously popular with anglers and whitewater boaters alike.

Despite the importance of recreational water uses in Colorado, they have not traditionally been well supported or protected by state water law. When the Colorado Supreme Court had to decide if property owners have the right to exclude rafters from rivers flowing through private lands, the court favored private property over the "right to float,"26 taking a narrower view of public access rights than the high courts of neighboring states. 27 Colorado also refused to allow instream water rights for recreational uses, even after it recognized such rights to protect the environment, as explained in the next subpart.

B. Water Laws and Water Institutions in Colorado

Colorado has been a leader, and arguably the leader, in the development of western water law since the nineteenth century. Its 1876 constitution not only

21. Id. at 241.
23. SOUTHWICK ASSOC'S., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER AND ITS TRIBUTARIES 3 (2012), http://www.protectflows.com/wp-content/uploads/2012/05/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf. Camping, snow sports, and wildlife viewing were the top three activities in dollar terms, contributing a majority of the total economic output of $9.577 billion. Fishing and water sports (such as rafting and kayaking) were fifth and sixth, with economic outputs of $835 million and $739 million, respectively. Id. at 31.
24. Id. at 7 (describing rivers covered by the study, including the mainstem Colorado, Green, Gunnison, San Juan, Yampa, and others).
25. COLO. WATER CONSERVATION BD., supra note 3, at 38.
enshrined prior appropriation as the water law of the state, but also declared that the "right to appropriate . . . shall never be denied." A few years later, in the famous case of Coffin v. Left Hand Ditch Co., the Colorado Supreme Court held that Colorado from its earliest days had allocated water solely by prior appropriation declining to recognize the eastern system of riparian water rights. The court’s rejection of riparian rights as anathema to arid regions originated the so-called “Colorado Doctrine” of pure prior appropriation, which was followed by the other states of the Mountain West.

Colorado water law today is primarily statutory, set forth in a detailed water code based on the Water Right Determination and Administration Act of 1969. In many respects, Colorado’s water code is similar to those of other western states that allocate and manage water under the prior appropriation doctrine. Colorado law is unique, however, regarding the process and standards for obtaining new water rights. As to the process, Colorado is famous in water law circles as the only state that does not require a state-issued permit as a precondition of making a new appropriation. As to the standards, Colorado does not impose any “public interest” test on applications for new water rights. In nearly all other prior appropriation states, the responsible water agency must find that a proposed use of water would not harm the public interest before issuing a permit for that use; in Colorado, the water code has no such

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28. The prior appropriation doctrine grew up in the American West of the nineteenth century and became the primary basis of western state water law. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 77–78 (4th ed. 2009). Under traditional prior appropriation, a person could establish a right to use water by intending to appropriate, diverting water from its natural course, and applying it to a beneficial use. Id. The user would thereby obtain a right to continue using the amount of water needed for the specific use to which the water was applied. Id. If total demands for water exceed the amount available in the source at a particular time, the available water goes to those whose uses were established at the earliest date, under the priority principle of “first in time, first in right.” Id.

29. Specifically, it states that unappropriated water is “the property of the public . . . dedicated to the use of the people of the state, subject to appropriation,” COLO. CONST. art. XVI, § 5, and that the right to appropriate the unappropriated waters of natural streams of the state for beneficial use shall never be denied. COLO. CONST. art. XVI, § 6.

30. 6 Colo. 443 (1882).

31. Id. at 447.

32. See A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 130 (7th ed. 2014) (explaining that the “Colorado Doctrine” is a pure form of prior appropriation, followed in those states that never recognized water rights based on the eastern common law doctrine of riparian rights).


34. See TARLOCK ET AL., supra note 32, at 203. In Colorado, a “conditional decree” serves the same purposes as a permit from the appropriator’s standpoint, in that it holds a priority date for a quantity of water that has not yet been applied to beneficial use, but it is unlike a permit in that a conditional decree is not a prerequisite to a valid appropriation. GETCHES, supra note 28, at 94–95.


36. This is true for all the permit states except Oklahoma, which once had a public interest test but eliminated it in 1963. Colorado and Oklahoma today are the two appropriation states without a public interest standard. Douglas L. Grant, Two Models of Public Interest Review of Water Allocation in the West, 9 U. DENV. WATER L. REV. 485, 486 nn.1–2 (2006).
requirement, and the courts that decide on new appropriations are not to consider public interest factors except as provided by statute.37

Applying prior appropriation principles, Colorado courts were at best reluctant to recognize appropriations for water flowing in its natural course, even when such claims were supported by strong policy arguments. For example, in Empire Water & Power v. Cascade Town Corp.,38 a federal court applying Colorado law did not allow a major resort near Colorado Springs to protect the natural flows of a waterfall—the scenic highlight of the resort—from being diverted by a proposed upstream hydropower project. The Empire Water & Power court recognized the economic value of the resort, the investments made by its owners,39 and even the public benefits associated with rest and recreation,40 but nevertheless refused to protect the flows of the waterfall because it believed the water laws of Colorado “proceed along more material lines.”41 Likewise, many years later the Colorado Supreme Court rejected a water district’s claim for instream flows to support an important recreational fishery on the Colorado River.42 The court held that diverting water from the river was needed to effect a valid appropriation, even though a state statute specifically authorized the district to “file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the amount necessary to preserve fish.”43

Colorado provided for instream flow appropriations by statute in 1973,44 but restricted these rights in three major ways. First, it authorized “minimum stream flow” rights only for purposes of environmental protection,45 leaving out such values as aesthetics and recreation. Second, it effectively limited the amount of water that could be appropriated for this purpose by providing for establishment of minimum flows only “to preserve the natural environment to a

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37. "A public interest argument is not a valid objection to a [proposed new appropriation] because such an argument conflicts with the doctrine of prior appropriation." Aspen Wilderness Workshop, Inc. v. Hines Highlands Ltd. P’ship, 929 P.2d 718, 725 (Colo. 1996).

38. 205 F. 123 (8th Cir. 1913) (applying Colorado law).

39. Id. at 128 (noting that the private resort featured a “railroad station, hotels, cottages, waterworks, park, roads, and trails,” and attracted 12,000 to 15,000 visitors per year).

40. The court had no trouble finding that the resort’s use of water was “beneficial,” stating, “[p]laces such as that described here, favored by climatic conditions, improved by the work of man, and designed to promote health by affording rest and relaxation are assuredly beneficial . . . . They are a recognized feature of the times, are important in their influence upon health, and multitudes of people avail themselves of them from necessity.” Id.

41. Id. at 129. In other words, the court believed Colorado’s water laws were aimed primarily at ensuring water supplies for extractive beneficial uses such as irrigation, mining, and domestic water supply.


43. Id. at 799–801.


45. COLO. REV. STAT. § 37-92-102(3) (2015) (providing for minimum instream flow rights as needed “to preserve the natural environment to a reasonable degree”).
reasonable degree. Third, and perhaps most importantly, it allowed only a single state agency, the CWCB, to obtain and hold instream flow water rights "for any purpose whatsoever." Another unique feature of Colorado’s water rights system is its water courts, which have exclusive jurisdiction to determine new appropriations and a variety of other “water matters.” These specialized courts, one for each of seven “divisions” corresponding generally to the state’s major river basins, decide these matters through judicial proceedings that may involve many parties. In addition to the applicant, there are often multiple objectors which are typically water right holders in the area affected by the proposed use, all of whom may offer evidence and argument regarding the application. Water court decisions are in the form of decrees, which are appealed directly to the Colorado Supreme Court, giving the high court of Colorado an unusually prominent role in interpreting and applying state water law.

By contrast, state agencies play only a limited role in the determination of water rights in Colorado. The State Engineer is responsible for the administration of water rights once they have been established, but does not determine the existence or parameters of those rights in the first instance. The Office of the State Engineer plays an advisory role in the early stages of water court proceedings, but once a matter reaches a formal hearing before a water judge, the statute provides only that “[t]he division engineer shall appear to furnish pertinent information and may be examined by any party . . . .” The State Engineer, the CWCB, and other agencies may be parties to water court proceedings, but their official status in such proceedings is no different from a

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46. *Id.* (emphasis added).

47. The statute provides that only the CWCB may hold a right “for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes, for any purpose whatsoever.” *Id.*


50. TARLOCK ET AL., supra note 32, at 203.

51. *Id.* This is notable because Colorado has an intermediate appellate court—the Court of Appeals—but it does not hear appeals of water court decrees.

52. Administration would include enforcing priority calls, ensuring that water rights are being exercised in accordance with their terms, etc. See *Colo. Rev. Stat.* § 37-92-301 (2015).

53. *Colo. Rev. Stat.* § 37-92-302(4) (2015). The statute calls for the water referee (who is not the water judge, but is an official of the water court), in conducting an investigation of a water right application, to “consult” with the State Engineer or division engineer. *Id.* The consulted official is to file a report with the referee, which in turn is sent to all parties. *Id.* If the matter proceeds to the water judge before this consultation occurs, the division engineer is to “file a written recommendation in the proceedings,” and that recommendation goes to all the parties. *Id.* Finally, the statute allows the water judge to “request such written report from the state engineer if the water judge desires.” *Id.*

54. *Colo. Rev. Stat.* § 37-92-304(3) (2015). In discussing this same language, Professor John Carlson wrote in 1973 that the statute gave the division engineer a limited role before the water court, focusing on disputed factual issues rather than policy questions. John Undem Carlson, *Report to Governor John A. Love on Certain Colorado Water Problems*, 50 DENV. L.J. 293, 326–27 (1973) (“[H]is role seems to be that of an aide to the court in determining the truth of the matters asserted.”).
private entity. Unlike the other western states, where the water agency makes water right decisions subject to possible judicial review of the agency’s action under familiar principles of administrative law, in Colorado such decisions are made exclusively in the courts.

The CWCB has a multifaceted mission regarding Colorado’s waters—the statute that lays out the agency’s powers and duties specifies twenty different authorities—but the dominant word in the statute is “utilization.” The purpose of CWCB programs is “to secure the greatest utilization of such waters and the utmost prevention of floods,” and the agency is authorized to take a range of actions for purposes of promoting such water utilization. As for water rights, the CWCB is authorized to file applications to appropriate water, to “take all action necessary to acquire or perfect water rights for projects sponsored by the board,” and is the only entity that may apply for and hold minimum stream

55. § 37-92-302(1)(b) (providing that “any person, including the state engineer” may file a statement of opposition to a water right application); see also § 37-92-304(2) (providing that “any person, including the state engineer,” may file in the water court to support or oppose a referee’s ruling). The statutory difference between the State Engineer (or other agency) and a private party is that state agencies are excused from paying filing fees. § 37-92-302(1)(d).

56. See, e.g., Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 77–78 (Idaho 2011) (explaining that a reviewing court must affirm agency decision unless it was contrary to constitution, statute, or required procedure, “not supported by substantial evidence on the record as a whole,” or “arbitrary, capricious, or an abuse of discretion,” and that the court cannot substitute its views for the agency’s on factual issues); Office of the State Eng’r v. Morris, 819 P.2d 203, 205 (Nev. 1991) (explaining that a reviewing court must not substitute its judgment for that of State Engineer, or reweigh evidence, but only ask if substantial evidence in the record supports the decision, and that decisions of State Engineer are presumed correct on judicial review); Postema v. Pollution Control Hearings Bd., 11 P.3d 726, 733 (Wash. 2000) (stating that the court reviews agency record and may reverse if agency has made an error of law, if agency’s order is not supported by substantial evidence, or if decision is arbitrary and capricious, and that party challenging agency action bears the burden of establishing invalidity). New Mexico is unusual in that its constitution provides for de novo review of state agency decisions “in matters relating to water rights.” N.M. CONST. art. XVI, § 5.

57. Colo. Rev. Stat. § 37-60-106 (2015) (stating powers and duties of the board in subsections 1 and 2; subsection 1 has parts running from (a) through (t), although (s) was repealed by the failure of a referendum).

58. § 37-60-106(1).

59. These activities include:

devis[ing] and formula[ting] methods, means, and plans for bringing about the greater utilization of the waters of the state . . . . cooperat[ing] with the United States and the agencies thereof, and with other states for the purpose of bringing about the greater utilization of the waters of the state of Colorado . . . . formula[ting] and prepar[ing] drafts of legislation, state and federal, designed to assist in securing greater beneficial use and utilization of the waters of the state . . . . [; and] investigat[ing] and assist[ing] in formulating a response to the plans, purposes, procedures, requirements, laws, proposed laws, or other activities of the federal government and other states which affect or might affect the use or development of the water resources of this state.

§ 37-60-106(1)(c), (e), (g)–(h). Several of these provisions also provide parallel authority for purposes of promoting flood control.

60. § 37-60-106(1)(m).

61. § 37-60-106(1)(n).
flow appropriations. But the statutes do not give the CWCB special powers or duties in the determination of water rights, leaving that job to the water courts.

The limited role of state agencies in the appropriations process reflects Colorado's longstanding philosophy on water rights and government. That philosophy is embodied in the Colorado Constitution, which states without qualification that "the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Requiring a state-issued permit for new water uses would arguably violate this constitutional "right to appropriate." Even a statute empowering a state agency to raise "public interest" concerns to the water courts in cases regarding new appropriations would likely face a constitutional challenge. In broad terms, Colorado's philosophy is that water is a resource that is freely available for private uses, that any Colorado citizen can and should be able to appropriate water for any beneficial use, and that water is best allocated through the actions of water developers and users (and reallocated, if necessary, through market forces). Under this view, government involvement in decisions about water rights would


63. The CWCB does have some special duties regarding RICO applications, however, as explained below. See infra notes 136–141 (describing the judicial determination of the CWCB's role in Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 589 (Colo. 2005)); infra notes 154–157 and accompanying text (explaining the changes to the CWCB's role enacted by S.B. 06-037, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006)).

64. COLO. CONST. art. XVI, § 6.

65. See, e.g., GETCHES, supra note 28, at 166 (noting that Colorado's rejection of permit requirement "reflects Colorado's interpretation of this provision of the state constitution, "which is similar to that of several other western states"). The author of Water Law in a Nutshell, David H. Getches, was a longtime University of Colorado law professor and one of the foremost scholars of Colorado water law.

66. See Carlson, supra note 54, at 330.

67. The exception, of course, is minimum streamflows, which by statute may only be appropriated and held by the CWCB. See supra notes 44–47 and accompanying text (explaining the minimum streamflow restrictions contained in Colo. Rev. Stat. § 37-92-102(3)).

68. With few exceptions, the law still reflects the view that John Carlson summarized in the early 1970s, not long after Colorado's 1969 water statute:

The existing water law of Colorado does not recognize the possibility that appropriators may seek to develop water rights which, although beneficial uses under existing law, are nonetheless socially undesirable for the public at large. If the use is "beneficial" in terms of the applicant's economic needs, that suffices. The water law now assumes that all growth and development give rise to "beneficial" uses of water, and in allocating the water, awards the first claimant. Thereafter the free market may cause a shift in uses, but the law is not concerned with the merit or demerit of the choice the market makes.

Carlson, supra note 54, at 324–25.
undermine prior appropriation and surely do more harm than good, and this philosophy still predominates in Colorado water law.

In sum, Colorado is a bellwether state for water policy not only because it has strongly influenced western water law, but also because its water demands and values are generally similar to those of others in the region. Like many other western states, Colorado devotes the great majority of its water to irrigation, but its rapidly growing population is fueling demands for new municipal water supplies. Recreational water uses are important in Colorado, partly for economic reasons, and outdoor amenities are a significant part of the state’s thriving and increasingly diversified economy. And Colorado’s water law, while based on prior appropriation as in other western states, reflects a belief in private initiative and a limited role for government. All of these elements of Colorado’s water reality influenced the development of the law regarding water rights for whitewater parks, which Part II briefly traces through 2006.

II. JUDICIAL AND LEGISLATIVE RECOGNITION OF RECREATIONAL WATER RIGHTS

Colorado first recognized “in-channel” recreational water rights in the 1990s. This recognition came not from legislation or agency policy, but from judicial decisions that confirmed such rights as valid appropriations under existing state water law. From modest beginnings, in-channel rights soon grew in number and size as cities sought to appropriate water for engineered in-channel courses specially designed for whitewater kayaking. The success of such claims generated major controversy in Colorado, resulting in the state legislature enacting two measures that both recognized and limited these rights. This Part briefly traces the development of Colorado law on these water rights, focusing on their original recognition by the courts, the CWCB’s role in the determination of recreational claims, and some of the key policy choices made by the Colorado legislature.

A. Judicial Recognition: Thornton v. Fort Collins and the Early Kayak Course Cases

The Cache la Poudre River flows through the heart of Fort Collins, Colorado, and in the 1980s, the city sought to maintain flow levels in this important recreational river. Fort Collins originally asked the water court to

69. “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.’” Kassen, supra note 62, at 52 (quoting Gregory J. Hobbs & Bennett W. Raley, Water Rights Protection in Water Quality Law, 60 U. Col. L. Rev. 841, 886 (1989)).

70. A stretch of the river flowing through Poudre Canyon above Fort Collins is Colorado’s only wild and scenic river, and is very popular for angling, whitewater boating, and other forms of recreation. Attractions: Poudre Canyon, VISIT FORT COLLINS, http://www.visitfcollins.com/attractions/poudre-
recognize its claims as "in-stream water rights" for the portion of the river flowing through town—which it called the "Poudre River Recreation Corridor"—and indicated that its plans did not involve any diversion from the river.71 These claims seemingly violated Colorado's minimum stream flow statute (described above),72 which did not allow a city to obtain such water rights.73 The claims drew opposition from the CWCB and several other parties, whose primary objection was that the city was unlawfully seeking minimum stream flow rights.74

Following negotiations with the CWCB, Fort Collins amended its claims by adding two "diversion structures" that would not actually remove water from the river but instead would direct or concentrate it within the channel to serve the city's purposes.75 The city had recently built the lower structure, the "Nature Dam," to redirect the river back into its historic channel; the river had shifted due to flooding in 1983–84 and restoring the river to its former course was part of the city's plans for a new nature center and associated recreational facilities.76 The upper structure, the "Power Dam," was an existing diversion beside the historic municipal power plant in downtown Fort Collins and was located near several parks.77 The court noted that the city had recently "renovated the Power Dam by strengthening the structure itself and by adding a boat chute and fish ladder designed for recreational use and piscatorial preservation respectively."78 By dropping any reference to in-stream water rights and adding these structures, Fort Collins sought to bring its claims within the bounds of existing statutes that recognized appropriations based on diversion of water and application to beneficial use.79

canyon (last visited Sept. 26, 2015) (promoting the river and the canyon as scenic and recreational amenities of the Fort Collins area).

72. See supra notes 44–47 and accompanying text (explaining the minimum streamflow restrictions in § 37-92-102(3)).
73. If it were not already clear that only the CWCB could obtain "in-stream" water rights, the Colorado legislature removed any doubt in 1987. See City of Thornton, 830 P.2d at 930 (citing Senate Bill 212, ch. 269, 1987 Colo. Sess. Laws 1305, 1305–06 (codified at § 37-92-102(3))). Fort Collins had filed its claims at the end of 1986. Id. at 919.
74. Id. at 920.
75. The city was able to reach a settlement with the CWCB by agreeing to recast its claims as more traditional, diversionary water rights. Id. Most of the other objectors also dropped out after the city amended its claims. Id. at 921.
76. Id. at 920. "Nature Dam" was the court's short form name for the Fort Collins Nature Center Diversion Dam.
77. Id.
78. Id.
79. Id. at 921 (quoting the amended application, stating that the city's purpose was always "to divert, as defined by statute, within the river's natural course or location, or otherwise capture, possess and control water for the described beneficial uses").
On appeal of the water court’s decree recognizing the city’s appropriation,\textsuperscript{80} the Colorado Supreme Court had no trouble finding that recreation, fish, and wildlife were legally recognized beneficial uses.\textsuperscript{81} The major question regarding the validity of the claims\textsuperscript{82} was whether the Nature Dam and Power Dam were diversion structures that were legally adequate to support an appropriation.\textsuperscript{83} After finding that “[a] diversion in the conventional sense is not required” for a valid appropriation,\textsuperscript{84} the court quoted the statutory definition of “diversion,” which “means removing water from its natural course or location, or controlling water in its natural course or location” by means of a “structure or device.”\textsuperscript{85} The court interpreted the statute to mean that “[c]ontrolling water within its natural course or location by some structure or device for a beneficial use thus may result in a valid appropriation.”\textsuperscript{86} Both the Nature Dam and the Power Dam could meet that test—the Nature Dam by redirecting the flow of the Poudre back into its historic channel,\textsuperscript{87} and the Power Dam by providing a boat chute to “allow kayaks or other flotation devices to pass through the Power Dam,” and a fish ladder to “assist fish to scale the Power Dam.”\textsuperscript{88}

Those opposing Fort Collins’ claim contended that the city was merely seeking a thinly disguised and illegitimate minimum stream flow—an argument made stronger by the city’s original claim.\textsuperscript{89} The Colorado Supreme Court pointedly rejected that argument, distinguishing the city’s claim from a CWCB minimum stream flow because the latter requires no diversion and typically involves none, whereas the city employed structures to control water for a recognized beneficial use. It did not matter, said the court, that the intended beneficial use required the water to remain in the river\textsuperscript{90} or that such an appropriation might serve purposes that a minimum stream flow also would:

\textsuperscript{80} The water court decree was only a partial victory for Fort Collins, as it denied an appropriation for the Power Dam. \textit{id.} at 919, 932.

\textsuperscript{81} The court simply quoted the statutory definition of beneficial use and then observed, “[t]his statute provides that water appropriated for municipal, recreational, piscatorial, fishery, and wildlife purposes is water put to beneficial uses.” \textit{id.} at 930 (citing COLO. REV. STAT. § 37-92-103(4) (2015)).

\textsuperscript{82} Two of the three major issues on appeal related to the priority of the right rather than the validity of the appropriation. See \textit{id.} 922–23 (whether amended application, filed in 1988, could relate back to the original 1986 filing), 924–29 (whether water court was correct in awarding a 1986 priority date for the Nature Dam appropriation).

\textsuperscript{83} The water court had held that the Nature Dam effected a valid diversion of water, but the Power Dam did not. See \textit{id.} at 929, 932.

\textsuperscript{84} \textit{id.} at 929.

\textsuperscript{85} \textit{id.} at 929–30 (quoting § 37-92-103(7)’s definition of “diversion” or “divert”).

\textsuperscript{86} \textit{id.} at 930.

\textsuperscript{87} \textit{id.} at 931.

\textsuperscript{88} \textit{id.} at 932. The court reversed the water court’s determination that the Power Dam would not divert or control water within the meaning of the statute, and stated that, if the boat chute and fish ladder actually controlled water to serve their intended purposes, that would be legally sufficient. The Colorado Supreme Court remanded the matter to the water court to “for a conclusive determination as to whether the boat chute and fish ladder can and will put water to beneficial use.” \textit{id.}

\textsuperscript{89} \textit{id.} at 929.

\textsuperscript{90} “The type of beneficial use to which the controlled water is put may mean that the water must remain in its natural course.” \textit{id.} at 931.
“Although controlling water within its natural course or location by some structure or device may effect a result which is similar to a minimum flow, that does not mean that the appropriation effected by the structure is invalid under the Act.”91

Fort Collins established a key precedent by using structures to appropriate water for use in the river channel, but its claim of fifty-five cubic feet per second (cfs)92 was a relatively modest amount of water.93 By holding that a boat chute could provide the legally required control of water for a recognized beneficial use, however, the Colorado Supreme Court laid a solid foundation for cities to appropriate water for whitewater parks, specially designed and constructed to provide whitewater features for kayak playboating at a range of flow levels.94 The first city to pursue an appropriation for such a facility was Golden, and in 1998 it filed a claim for a large amount of water—up to 1000 cfs—for its new downtown whitewater park on Clear Creek.95

Golden’s application drew opposition from several water users, but eventually all of them withdrew or settled, leaving the CWCB and the State Engineer as the only objectors.96 The CWCB fought the application hard in the water court, challenging both the legality of the appropriation and the amount of water claimed.97 Golden contended that its appropriation was consistent with the Fort Collins precedent, that its claimed flows were reasonable because the city wanted a world-class whitewater course (not just minimally adequate flows for kayaking), and that the course would generate major economic benefits for the city.98

Golden prevailed in the water court, and the decree not only recognized the kayak course as a legitimate appropriation under Fort Collins,99 but also awarded

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91. Id.
92. A cubic foot per second (cfs) is a measure of the flow of water, commonly applied to rivers and larger water rights. It is equal to 448.8 gallons per minute, and a flow of 1 cfs for twenty-four hours will deliver a volume of just under two acre-feet. TARLOCK ET AL., supra note 32, at 889; see also supra note 12 and accompanying text.
93. City of Thornton v. City of Fort Collins, 830 P.2d 915, 919 (Colo. 1992). The final decree, however, awarded Fort Collins 30 cfs from May through August, and only 5 cfs during the other eight months. See Kenneth W. Knox, Colorado Whitewater Courses and Water Rights, THE WATER REPORT, Aug. 15, 2006, at 1, 4, http://cwcbweblink.state.co.us/WebLink/DocView.aspx?id=140262&page=1&dbid=0 (noting that the historic daily flow in the river at Fort Collins is 213 cfs in May, 425 cfs in June, and 112 cfs in July).
94. City of Thornton, 830 P.2d at 932.
95. Porzak et al., supra note 4, at 214–15 (explaining origins of Golden’s kayak course and its water right claim). The original course had seven structures in the channel of Clear Creek, requiring four thousand tons of rock and eight hundred tons of grout or cement. Id. at 214.
96. The water users included two towns, two cities, a county, a ski company, and Coors Brewing, all of which withdrew their statements of opposition or entered into stipulations with Golden. In re Water Rights of the City of Golden, No. 98CW448, slip op. at 1–2 (Colo. Water Div. 1, June 13, 2001).
97. See Porzak et al., supra note 4, at 216–220 (summarizing and criticizing the CWCB’s arguments in the water court).
98. Id. (explaining Golden’s arguments and supporting evidence, including an estimated economic benefit of $23 million over time).
Golden's claimed flow levels up to 1000 cfs. On the issue of beneficial use, the court found that the Golden course’s strong reputation among boaters “translates directly into economic value for the City in that it attracts boaters from across the State, the Country and even international competitors.” The court also specifically found that the claimed flow levels were reasonable in light of Golden’s purposes for the course and the recreational and economic benefits associated with high flows. The court concluded that the city’s constitutional right to appropriate water “may not be denied or limited based on ... policy restraints purportedly rooted in concern for the quantities that should be left for future water users.”

The agencies appealed, and the case attracted numerous amici from across the state. Golden prevailed when the Colorado Supreme Court deadlocked three-to-three, thereby automatically affirming the water court. The Colorado Supreme Court deadlock also meant victory for the ski towns of Vail and Breckenridge. Both towns had filed in 2000 to appropriate water for their kayak courses on Gore Creek and the Blue River, respectively, and had been awarded decrees after trial in the water court for Division 5. The appeal of these decrees was argued while the Golden decision was pending, and the Colorado Supreme Court announced its three-to-three decision in that appeal on the same day as the Golden case. As these cases were making their way through the courts, however, the Colorado legislature was addressing the issue of water rights for whitewater parks.

100. Id. at 4–5 (daytime decreed flow levels, including 1000 cfs for May, June, and July, 559 cfs for August, and lower levels for other months). A portion of each month’s flow was decreed as “absolute” based on proven beneficial use, and a portion was “conditional,” reflecting the need to show beneficial use at higher flow levels. Id. at 5.

101. Id. at 6 (“[T]he reputation of the Course is in large part due to the high flows.”).

102. Id. at 7–8. The court also noted that Golden’s use was nonconsumptive, that most of the water was already required to pass through Golden to meet existing downstream rights, and that Golden had made concessions to accommodate a certain amount of future upstream development. Id. at 7.

103. Id. at 10 (citing Colorado Supreme Court cases rejecting the use of public interest considerations in determining new water rights).


105. Justice Hobbs did not participate in the decision, leaving only six voting justices. Id. at 1028; see Porzak et al., supra note 4, at 226–27 (explaining Golden’s motion to disqualify Justice Hobbs, and noting that he recused himself after the motion was denied), 227–232 (summarizing each side’s arguments on appeal).

106. Id. at 233–34.

107. Id. at 234–36. The Breckenridge right was decreed at 500 cfs in June, and Vail’s at 400 cfs from May through July, with lower levels in other months. Knox, supra note 93, at 4.

108. Id. at 236.

While Golden and the CWCB were battling in the water court over the city's application,\textsuperscript{110} a bill appeared in the Colorado legislature that would have given the CWCB much greater control over applications for kayak course water rights. In its early versions, Senate Bill 216 (SB 216) empowered the CWCB to determine whether a "recreational in-channel diversion" application should be granted, denied, or granted for less water than claimed.\textsuperscript{111} Although officially only a "recommendation" to the water court, the CWCB determination would have been difficult to overturn because the bill required the water court to apply the deferential standards of judicial review applicable to most state agency decisions.\textsuperscript{112} The bill also would have applied to pending claims\textsuperscript{113} and repealed most of its own provisions after two years.\textsuperscript{114}

By the time SB 216 became law, however, the legislature had turned the bill into an affirmation of kayak course water rights determined through water court proceedings.\textsuperscript{115} The new law recognized "recreational in-channel diversion" as a special type of beneficial use\textsuperscript{116} involving water that is "diverted, captured, or

\footnotesize
\textsuperscript{110} Porzak et al., \textit{supra} note 4, at 224 (noting that the bill was introduced during a break in the water court trial on the Golden application).
\textsuperscript{111} S.B. 01-216, 63d Gen. Assemb., 1st Reg. Sess. (Colo. 2001) (as amended by Senate Public Policy and Planning Committee). Section 1 of the bill as introduced would have required an applicant to obtain from the CWCB, "following a public hearing, upon such application, a final recommendation as to whether the application should be granted, granted with conditions, or denied." \textit{Id}. This requirement would not apply if the claim was for less than 50 cfs. \textit{Id}.
\textsuperscript{112} \textit{Id}. Section 3 of the bill required the water court, in reviewing the CWCB's recommendation, to use "the criteria of section 24-4-106 (6) and (7)." \textit{Id}. The former provides for review of the decision on the record developed in the agency proceeding, and the latter specifies the standards of review, including the deferential "arbitrary and capricious" and "substantial evidence" standards endemic to administrative law:

If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action . . . .


\textsuperscript{113} Colo. S.B. 01-216. Sections 2 and 3 of the bill specified that their provisions applied to applications filed on or after December 1, 2000. \textit{Id}. Thus, Golden's 1998 application would have been exempted, but the Vail and Breckenridge applications—filed in late December, 2000—would have been subject to the bill.

\textsuperscript{114} \textit{Id}. In several places, the bill followed a substantive provision by stating that the preceding subsection would be repealed, effective July 1, 2003. \textit{Id}.

\textsuperscript{115} Act of June 5, 2001, ch. 305, 2001 Colo. Sess. Laws 1187 ("concerning the establishment of a procedure for the adjudication of a recreational in-channel diversion by a local government, and making an appropriation therefor.").

controlled, and placed to beneficial use between specific points defined by physical control structures . . . for a reasonable recreation experience in and on the water." The CWCB was given authority to make factual findings and a recommendation on the application, but the provision giving the agency's decision great weight was dropped. Instead, the factual findings were made rebuttable and the recommendation would simply become "part of the record to be considered by the water court . . . ." Gone too were the two-year sunset provisions. Yet the law also imposed important limitations on recreational claims. It defined RICD as "the minimum stream flow . . . for a reasonable recreation experience in and on the water," and perhaps most significantly, it allowed only local governments and water districts to obtain RICD water rights.

Disputes soon arose over the meaning of SB 216, and the first RICD to be decreed under the new law was appealed to the Colorado Supreme Court. The Upper Gunnison River Water Conservancy District had filed for an appropriation for a new kayak course on the Gunnison River near the town of Gunnison, claiming flow levels as high as 1500 cfs. The CWCB had reviewed the application and recommended that it be approved, but only for a flow of 250 cfs from May through September—a fraction of the district's requested levels. The water court, however, found that the district had introduced evidence sufficient to overcome the CWCB's findings and decreed the right in the requested amounts.

117. § 2, 2001 Colo. Sess. Laws at 1189 (codified at § 37-92-103(10.3)) (definition of recreational in-channel diversion).
118. § 1, 2001 Colo. Sess. Laws at 1187-88 (codified at COLO. REV. STAT. § 37-92-102(6) (2015)) (listing specific factors to be considered by the CWCB in evaluating the application).
119. § 3, 2001 Colo. Sess. Laws at 1189 (codified at COLO. REV. STAT. § 37-92-305(13) (2015)) (stating the CWCB's findings of fact "shall be presumptive as to such facts, subject to rebuttal by any party").
120. Id. (codified at § 37-92-305(16)).
121. § 2, 2001 Colo. Sess. Laws at 1189 (codified at § 37-92-103(10.3)) ("Recreational in-channel diversion means the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use.").
122. Id. (codified at § 37-92-103(4) (definition of beneficial use), 37-92-103(7) (definition of diversion or divert), 37-92-103(10.3) (definition of beneficial use)). These definitions limit the eligible entities to counties, municipalities, and certain types of water districts.
124. "Applicant hopes to draw both locals and tourists, host competitions, enhance Western State College's outdoor recreation program, and strengthen the region's overall economy." Id.
125. The 1500 cfs level was only for two weeks in late June and the first two weeks of July, but the claim sought over 1000 cfs from mid-May through mid-July, with lower levels in early May and from mid-July through September. Id. at 589 n.1.
126. Id. at 589 (quoting the CWCB's findings that a flow of 250 cfs would create whitewater features sufficient to attract experienced kayakers).
127. Id. at 589-90 (summarizing the water court's findings and decree).
On appeal a unanimous Colorado Supreme Court provided a detailed interpretation of SB 216. One key issue was the meaning of the "minimum stream flow . . . for a reasonable recreation experience" language in the RICO definition, and what requirements or limitations it imposed on the quantity of a kayak course appropriation. With neither a statutory definition of key terms nor a common or accepted usage of "reasonable recreation experience," the court dug into the legislative history but found no clear expression of legislative intent regarding the standard for quantifying RICO rights. The court ultimately concluded that the water court must first determine that the requested flow amounts are objectively "reasonable on the particular stream" where the course is located, and if it finds that they are, the water court must then "determine the minimum amount of stream flow necessary to accomplish that intended recreation experience."

The other key issue before the Colorado Supreme Court in Upper Gunnison was the role of the CWCB in evaluating applications for RICO appropriations. Here the court found both the text and the legislative history to be much clearer: the legislature "intended for the CWCB to function as a narrowly constrained fact-finding and advisory body when it reviews RICO applications, rather than in an unrestricted adjudicatory role." The court noted that SB 216 as introduced would have allowed the agency to decide the quantity of a RICO appropriation, but that version did not pass. The statute instead gave the CWCB a "constrained . . . [but] not unimportant" role, evaluating each RICO application against five specified factors, requiring a "careful, probing analysis."

In conducting this review, the agency must consider the application

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128. Once again there were numerous amicus curiae before the Colorado Supreme Court, roughly equally divided between the two sides. Porzak et al., supra note 4, at 241.
129. The phrasing of the RICO definition, while odd, is similar to the statutory language establishing environmental flows as a beneficial use in Colorado: "such minimum flows . . . as are required to preserve the natural environment to a reasonable degree." COLO. REV. STAT. § 37-92-103(4) (2015).
130. The court observed that the term "reasonable recreation experience" was at least somewhat subjective:
[The reasonableness of a given recreation experience such as whitewater kayaking may vary by the appropriator's perspective. A casual kayaker, for example, may be satisfied with low to moderate flows, while an expert probably demands higher stream flows. Also, some non-kayakers may consider enough stream flow to merely float the kayak reasonable.]

Upper Gunnison, 109 P.3d at 599.
131. Id. at 599–602.
132. "This determination necessarily will vary from application to application, depending on the stream involved and the availability of water within the basin." Id. at 602. The court had earlier noted that "the reasonableness of an appropriator's sought recreation experience is directly related to the available, unappropriated streamflow, thereby depending entirely upon the river basin on which it is sought. Consequently, not all rivers and streams in the state may support world-class whitewater courses." Id.
133. Id. at 603. The court remanded the Upper Gunnison case to the water court to apply this test.
134. Id. at 593.
135. Id. at 594.
136. Id. at 595. The five factors relate to the potential effect of the application on Colorado's ability to utilize all the water to which it is entitled under interstate compacts; whether the stream reach is
as submitted and cannot substitute its own judgment regarding appropriate flow levels. Yet it failed to follow these mandates in considering the Upper Gunnison application, and the court concluded that the CWCB's "limitation of Applicant's claimed RICD to 250 cfs was a clear violation of SB 216, which requires the CWCB to review the application strictly as submitted by the applicant, make the requisite statutory findings of fact, and formulate a recommendation to the water court." The Upper Gunnison decision left the CWCB with less power than it wanted over RICD applications, but the court's direction on reasonable/minimum flows gave the agency a clearer basis for challenging large claims in the water courts. And the next RICD application to go to trial, filed by Steamboat Springs for water rights on the Yampa River, was indeed a large one, with the city originally claiming up to 1700 cfs. The CWCB recommended denial, in part because it saw the application as conflicting with the "maximum utilization" of Colorado's water resources. The CWCB and the State Engineer fought hard to have the water court reject or reduce the claim. The agencies lost, however, because the water court applied the Upper Gunnison test and found, among other things, that the city's appropriation would not interfere with upstream water development in the Yampa River basin. Unlike the CWCB, the court saw no conflict between the application and maximum utilization of Colorado's waters, concluding that the RICD "is consistent with and, in fact, promotes the 'maximum utilization' principle in Colorado. It is a new, clean use of water on top of, and that works in tandem with, existing and future downstream diversions, generating revenue without polluting or consuming a single drop." After the water court entered the appropriate for the intended use; whether there is access to use the stream for recreation; whether the application would injure instream flow rights held by the CWCB; and whether the right "would promote maximum utilization of waters of the state." *Id.* at 592 (quoting COLO. REV. STAT. § 37-92-102(5) (2015)).

137. *Id.* at 594.
138. "[T]he CWCB literally ignored the application before it in favor of opining generally on its perception of the appropriate stream flow and more reasonable recreation experience." *Id.*
139. *Id.* at 596.
140. Porzak et al., *supra* note 4, at 243.
141. Through settlements with opposing water users, the city agreed to reduce this amount to 1400 cfs. *Id.* at 245.
142. See *id.* at 244 (citing the CWCB's findings and recommendations on the Steamboat Springs application).
143. "While the CWCB had clearly been a consistent and zealous opponent of all the previous RICO water rights, it pulled out all the stops in its opposition to the Steamboat claim." *Id.*
144. The city had reached agreement with other water users in the basin to address potential concerns about the application's potential impact on upstream development. *Id.* at 245. With these agreements incorporated into the city's decree, the water court found that the appropriation for "the Boating Park RICD in accordance with this Decree does not have any material impact on the development of future water supplies for existing and future upstream development." Amended Findings of Fact, Conclusions of Law and Decree of the Court at 7, *In re Water Rights of the City of Steamboat Springs, No. 03CW86* (Colo. Dist. Ct., Water Div. 6, Mar. 13, 2006).
Steamboat Springs decree, the parties agreed on a modified written order in lieu of an appeal.\textsuperscript{146}

As RICD applicants sought to appropriate relatively high flows on several different rivers,\textsuperscript{147} the Colorado legislature saw a renewed push to rein in whitewater park appropriations. A 2005 bill that would have imposed much tougher standards and restrictions on RICDs passed the Senate but died in the House.\textsuperscript{148} The following year, however, the legislature reached agreement on a new RICD statute.

\textbf{C. The 2006 Statute: Adjusting and Clarifying the Standards for New RICD Claims}

Senate Bill 37 (SB 37), enacted in 2006,\textsuperscript{149} largely preserved the existing law on RICD applications, while making some notable revisions in the standards applicable to new claims.\textsuperscript{150} The statute merits close attention not only because SB 37 represents the Colorado legislature's last word on the subject of RICDs, but also because it was enacted with a nearly unanimous vote.\textsuperscript{151}

The 2006 statute is perhaps most notable for what it did not do. It did not change the recognition of RICDs as a specific type of beneficial use, the ability of local governments to pursue RICD rights for whitewater courses, and the authority of the water courts to determine them. It did not authorize the CWCB to determine flow levels, as the agency tried to do in \textit{Upper Gunnison}. And it did not impose a statutory cap on the flow levels that could be appropriated for a RICD, as the failed 2005 bill would have done.\textsuperscript{152} In the big picture, the most significant policy choice the legislature made was to leave the core of the existing RICD law in place.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{146} Id. at 1. The decree recognizes eight different semimonthly flow levels from April 15 through August 15, with the highest being 1400 cfs in early June, 1000 cfs in late May, and 650 cfs in early May and late June. Id. at 4.
\item \textsuperscript{147} An article by a Colorado state official in 2006 included a table showing pending RICD applications. The highest flows were claimed by Salida (on the Arkansas River), up to 1800 cfs; Carbondale (on the Roaring Fork River), up to 1600 cfs; and Durango (on the Animas River), up to 1400 cfs. Knox, supra note 93, at 4. The Arkansas River application, actually filed by Chaffee County for the whitewater parks in Buena Vista and Salida, was entered after the applicants settled with all parties, including the CWCB. Porzak et al., supra note 4, at 251–54. The terms of the decree are complex, but it provides for 1400 cfs for a thirty-day period in early summer, and 1800 cfs for several days in June for special events. Id. at 253.
\item \textsuperscript{148} See Porzak et al., supra note 4, at 250–51.
\item \textsuperscript{149} Act of May 11, 2006, ch. 197, 2006 Colo. Sess. Laws 906 (concerning the adjudication of recreational in-channel diversions).
\item \textsuperscript{150} § 4, 2006 Colo. Sess. Laws at 909 (stating that the act applies only to “applications for and the administration of new recreational in-channel diversions filed on or after the effective date of this act”).
\item \textsuperscript{152} S.B. 05-062, 65th Gen. Assemb., 1st Reg. Sess. § 1 (Colo. 2005) (re-engrossed version, Mar. 1, 2005) (changing definition of beneficial use to specify that water diverted for a RICD in excess of 350 cfs would be “conclusively deemed to be wasted”).
\end{enumerate}
\end{footnotesize}
SB 37 did, however, make some notable revisions, which reflect certain policy choices about recreational water rights. Although the statute addresses a wide range of issues, perhaps the most important provisions promote five goals: limiting the role of the CWCB; clarifying the factors for determining and quantifying RICO rights; restricting RICD seasons and time periods; allowing for modest upstream development; and discouraging larger claims.

Limiting the role of the CWCB. Given that the CWCB had been leading the effort to defeat or reduce large RICO claims, it is remarkable that the legislature in SB 37 chose to diminish the agency’s role in the determination of RICO rights. No longer would the CWCB make a recommendation to the water court on whether the application should be granted, cut back, or denied. Instead, the agency would only make written findings on three factual issues, two fewer than the 2001 statute required. SB 37 also eliminated the CWCB’s power to establish, by rulemaking, new factors that the agency would use to evaluate RICD claims.

Specifying standards for approval and quantification. After the Colorado Supreme Court found the 2001 statute unclear as to the meaning of “minimum stream flow” and “reasonable recreation experience,” the legislature added several details in SB 37. Perhaps most significantly, the statute listed five factors that the water court must consider in determining appropriate flow amounts for a RICO: the flow needed to accomplish the claimed recreational use; benefits to the community; the intent of the appropriator; stream size and characteristics; and the total streamflow available at the control structures during the period for which the claim is made. This list is not exclusive, as the statute directs the court to “consider all of the factors that bear on the reasonableness of the claim,” including these five.
application, in particular requiring the water court to deny an application that "would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements." Finally, SB 37 added a restrictive detail by defining "reasonable recreation experience" as the use of a RICO "for, and limited to, nonmotorized boating."

Restricting RICO seasons and time periods. While the 2001 statute was silent on the season of use for RICD rights and the time periods within RICO decrees, SB 37 imposed new restrictions in these areas. As to the season of use, the 2006 statute limited RICO rights to the period from April 1 through Labor Day unless the applicant can show demand before or after those dates. As to time periods, SB 37 required that each time period covered by a RICO decree be at least two weeks long unless the applicant can show why a shorter time is needed. It also limited each time period to one specified flow rate, perhaps reflecting a concern that overly complex RICO decrees would be too hard to administer.

Allowing for some upstream development. A recurring concern with RICDs, especially large ones, is that they will foreclose opportunities for upstream water development. SB 37 addressed this point by allowing for certain upstream actions that would reduce flows to the RICO by relatively small amounts. Specifically, the statute created a presumption that "subsequent appropriations or changes of water rights" will not materially injure a RICO if the effect of any individual one "does not exceed one-tenth of one percent of the lowest decreed flow rate" for the RICO right, "and the cumulative effects . . . of all such appropriations or changes do not exceed two percent of the lowest decreed flow rate" for the RICO. Thus, a decreed RICO could not block all

158. These criteria relate to impairment of Colorado's ability to use its compact entitlements; maximum utilization of Colorado's water resources; the appropriateness of the stream reach; public access for recreational use; and injury to instream flow rights. § 3, 2006 Colo. Sess. Laws at 908 (codified at § 37-92-305(13)(a)).

159. § 3, 2006 Colo. Sess. Laws at 909 (codified at § 37-92-305(13)(c)). This is one of the five factors on which the water court must make affirmative findings, but because it is the only one that the statute singles out as requiring denial, it does not appear that denial would be absolutely required in the event of a negative finding on one of the other four factors.


161. Several of the early recreational water rights had decreed flows outside this time period, and a few, including Golden's, had decreed flows for all twelve months. See Knox, supra note 93, at 4.

162. The applicant must "demonstrate that there will be demand for the reasonable recreation experience on additional days." § 2, 2006 Colo. Sess. Laws at 908 (codified at § 37-92-103(10.3)).

163. Id.

164. Id.

165. In 2006 an official with the Office of the State Engineer expressed concerns regarding administration of complex RICO decrees. Knox, supra note 93, at 5–6.

166. Id. at 3–4.

167. § 2, 2006 Colo. Sess. Laws at 908 (codified at § 37-92-103(10.3)).
upstream development unless it could rebut the presumption that small reductions in flow would not cause material injury.168

**Discouraging larger RICO claims.** The failed 2005 bill, which would have effectively capped any new RICO right on any stream at 350 cfs,169 showed the legislature’s interest in limiting the amount of water that could be appropriated for this purpose. SB 37 also addressed this issue, but its quantity threshold for new claims was far less rigid in two key respects. First, SB 37 drew the line in a way that was tailored to the size of the stream where the RICO would be located. Specifically, the statute set a threshold of 50 percent of the “sum of the total average historical volume of water for the stream segment on which the [RICO] is located for each day on which a claim is made.”170 Second, SB 37 did not prohibit RICOs larger than this threshold, but instead imposed two specific restrictions on them. The statute limited such rights to three decreed time periods for the entire season171—they could otherwise have at least ten172—and prohibited the RICO right holder from making a priority call173 when less than 85 percent of the decreed flow would be available.174 By imposing these restrictions, the legislature apparently sought to discourage new applicants from claiming more than half the average flow during the RICO’s season of use.

In sum, SB 37 made only modest changes to the law governing RICO appropriations. The provisions defining the role of the CWCB and the standards for determining and quantifying rights were not much different from what the Colorado Supreme Court stated in *Upper Gunnison.*175 The limits on season of use and decreed time periods impose modest restrictions on applicants, and the allowance for upstream development set low thresholds for its presumption

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168. The statute says only that there “shall be a presumption” of no material injury for effects on the RICO below the specified threshold. *Id.* This presumption is apparently rebuttable, however. *See* Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 596 (Colo. 2005) (discussing meaning of “presumptive” in 2001 RICO statute, and concluding that presumption is rebuttable), superseded by statute in part, S.B. 06-037, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006).


170. § 3, 2006 Colo. Sess. Laws at 908 (codified at COLO. REV. STAT. § 37-92-305(13)(f) (2015)). The statute also required the water court issuing a RICO decree to specify the volume of water appropriated for the entire season, by calculating the sum of the daily flow rates and multiplying that number by 1.98—that converting flow in cfs into volume in acre-feet. *Id.* (codified at § 37-92-305(13)(e)).

171. § 3, 2006 Colo. Sess. Laws at 909 (codified at § 37-92-305(13)(f)). The statute also provides that a right exceeding the 50 percent threshold can only have one decreed flow rate for each of the three time periods, but the requirement of one flow rate per decreed time period applies to all RICO rights. § 2, 2006 Colo. Sess. Laws at 908 (codified at § 37-92-103(10.3)).

172. The statute allows RICO rights to extend from April 1 through Labor Day, and allows time periods as short as fourteen days, with the possibility of a longer season and shorter time periods. *Id.* Thus, the statute provides up to a five-month season for RICO rights with two time periods per month.

173. A “call,” or “priority call,” occurs when a senior user is not receiving a full water supply under her right, and results in junior users—those with later appropriations, who are no longer “in priority” given the limited water supply—being shut off or curtailed so as to ensure that the senior user gets all her water.

174. § 3, 2006 Colo. Sess. Laws at 909 (codified at § 37-92-305(13)(f)).

175. *See supra* notes 134–139 and accompanying text.
against injury of RICD rights. While the restrictions on new appropriations exceeding the 50 percent threshold were significant, they were not draconian. They allowed new RICDs claiming half the historically available flow without any special restrictions, and they allowed even larger RICDs to be decreed for up to three time periods. Viewed as a whole, the 2006 statute reflected a policy preference for smaller and simpler RICD rights, but still allowed applicants that could meet specific standards to appropriate as much water as needed for their intended recreational uses.

The enactment of SB 37 basically ended a period of rapid evolution in Colorado law regarding in-channel recreational water rights. That evolution began with the Fort Collins decision and accelerated when Golden filed its application seeking high flows for its whitewater park on Clear Creek. From 2000 through 2006 there were a dozen new applications, several water court trials, two Colorado Supreme Court cases, and most importantly, two statutes that established the framework for new claims. Part III considers the results of this flurry of activity, summarizing developments since 2006 and outlining the current status of RICDs in Colorado.

III. THE CURRENT STATUS OF WHITENESW PARK WATER RIGHTS IN COLORADO

According to the CWCB, Colorado had eighteen whitewater courses with decreed appropriations as of 2015. They can be found in nearly every part of the state; six of Colorado's seven regional water courts have decreed at least one RICD right. There is also a fair bit of variation among these rights. Several predate legislative recognition of RICD rights, but most of them were filed in

176. Moreover, the statute allowed RICD applicants to show the need for a longer season or shorter time periods, and established only a “presumption” of no injury to RICD rights from small-impact upstream actions, § 2, 2006 Colo. Sess. Laws at 908 (codified at § 37-92-103(10.3)).

177. See Porzak et al., supra note 4, at 255 (describing these provisions as “[p]erhaps the most significant change [to SB 37 as introduced] made in the House that was ultimately enacted into law”).

178. The statute imposed these restrictions only if the RICD right “exceeds” the 50 percent threshold, § 3, 2006 Colo. Sess. Laws Ch. at 909, (codified at § 37-92-305(13)(f)).

179. E-mail from Suzanne M. Sellers, Prof’l Eng’r., Program Manager, Colo. Water Conservation Bd., to author (July 8, 2014) (on file with author) [hereinafter CWCB 2014 RICD spreadsheet] (source of this information is the undated and untitled spreadsheet with information on Colorado whitewater parks and RICD water rights attached to this email). The spreadsheet shows twenty decreed rights, two of which are for the “Nature Dam” and the “Power Dam” in Fort Collins, which are not part of a whitewater park. See id.

180. Although nine of the twenty decreed rights as of 2014 are in Division 5 (Colorado River mainstem and smaller tributaries), and five more are in Division 1 (South Platte and its tributaries), there is at least one decreed RICD in all others except Division 3 (Rio Grande). Id. Three divisions have a single RICD right: Division 4 (Upper Gunnison River Water Conservation District on the Gunnison), Division 6 (Steamboat Springs on the Yampa), and Division 7 (Durango on the Animas).

181. For the twenty decreed RICDs, eight were filed in 2000 or earlier. Id. Fort Collins holds the earliest decrees—one each for the “Power Dam” and the “Nature Dam.” See generally supra Part II.A. The City of Littleton filed in 1994 for a park on the South Platte River and received a decree for 100 cfs year-round. CWCB 2014 RICD spreadsheet, supra note 179. Golden filed its pathbreaking application on
2001 (the year of the original statute) or later.\textsuperscript{182} And although some rights, especially the early ones, are modest in size,\textsuperscript{183} most of them appropriate relatively high flows.\textsuperscript{184}

The largest RICD claim yet—filed in 2013 by Glenwood Springs for three different whitewater parks on the Colorado River\textsuperscript{185}—is pending in the water court. While the maximum flow claimed, 4000 cfs, is startlingly large even by RICD standards,\textsuperscript{186} the application gives reason to believe that the city’s goals are far more modest. The 4000 cfs flow is only for special events, and would be good for no more than five days per year; otherwise, the maximum flow level is 2500 cfs.\textsuperscript{187} Moreover, the application states that the city seeks to appropriate no more than 50 percent of the average historical flow during the period of the decree\textsuperscript{188} (thus avoiding the statutory restrictions on larger rights\textsuperscript{189}), and estimates that “this is expected to result in no more than 46 days a year with flow rates in excess of 1250 c.f.s.”\textsuperscript{190} Thus, the city’s claim of 2500 cfs from April 30 through July 23—a period of eighty-five days—may end up being substantially

\textsuperscript{182} CWCB 2014 RICO spreadsheet, supra note 179 (showing twelve decreed RICDs with filing dates from 2001 through 2010).

\textsuperscript{183} The smallest decrees are the oldest, those of Fort Collins (maximum 30 cfs on the Poudre, filed in 1986) and Littleton (100 cfs on the South Platte, filed in 1994). Other decrees with relatively low maximum flow rates include those of Aspen (350 cfs on the Roaring Fork, filed in 2000) and Pueblo (500 cfs on the Arkansas, filed in 2001). \textit{id.}

\textsuperscript{184} The largest decreed flow rate, 1800 cfs, is held by Chaffee County, for the Buena Vista and Salida whitewater parks on the Arkansas River. \textit{id.}; see supra note 147 and accompanying text (summarizing the Chaffee County decree). Several other RICD rights have decreed maximum flow rates of 1000 cfs or greater: those of Carbondale (1600 cfs on the Roaring Fork), Grand County (1500 cfs on the Colorado in Gore Canyon), Steamboat Springs (1400 cfs on the Yampa), Durango (1400 cfs on the Animas), Avon (1400 cfs on the Eagle), Pitkin County (1350 cfs on the Roaring Fork), Upper Gunnison (1200 cfs on the Gunnison), and Golden (1000 cfs on Clear Creek). Some of the rights with smaller flows are nonetheless sizable in relation to the streams where the courses are located, such as those of Silverthorne (600 cfs on the Blue River), Vail (400 cfs on Gore Creek), and Longmont (350 cfs on St. Vrain Creek). CWCB 2014 RICD spreadsheet, \textit{supra} note 179.


\textsuperscript{186} The highest flow in any existing decree is Chaffee County’s 1800 cfs on the Arkansas. CWCB 2014 RICD spreadsheet, supra note 179. That number is somewhat misleading, however, as that is a “special event” flow good for a maximum of eight days in the early summer; otherwise, the high flow in that decree is 1400 cfs. See \textit{supra} note 147 and accompanying text.

\textsuperscript{187} These five days of event flows at 4000 cfs would occur between May 11 and July 6; otherwise, the maximum flow claimed is 2500 cfs, for the period of April 30 through July 23. Glenwood Application, supra note 185, at 3.

\textsuperscript{188} \textit{Id.} at 7.

\textsuperscript{189} See \textit{supra} notes 152, 170–174 and accompanying text.

\textsuperscript{190} Glenwood Application, \textit{supra} note 185, at 7 (stating that this estimate is based on “preliminary engineering”).
reduced in duration, flow level, or both. Except for a few weeks of high flows, then, the city says it seeks to appropriate no more than 1250 cfs, a level within the range of several existing decrees.

As of the summer of 2015, the Glenwood Springs claim was the only pending application in Colorado for a new RICO right, and the only one filed since the end of 2010. Although there was never a flurry of new applications, the pace has clearly slowed in recent years. From 2000 through 2006, one to three new RICO applications were filed each year, involving a total of thirteen new whitewater courses. From 2007 through 2013, however, only two years saw any applications for a new RICO appropriation, involving a total of six whitewater courses. Colorado has several other whitewater courses for which a local government could potentially pursue a RICO decree, but never has. While there are undoubtedly several factors influencing the decline in new applications, the most obvious explanation is that the 2006 statute has had a chilling effect on new RICO claims—especially since the two applications that year were filed in February and May, just prior to the signing of SB 37.
Another important change in RICO practice also began in 2006: major applications started being resolved by settlement rather than going to trial in the water courts. The shift to negotiated agreements on large claims may have begun with the Chaffee County claims on the Arkansas River, which were settled and decreed in 2006 despite involving the highest flow levels of any RICD application ever. Over the next two years the sizable appropriations of Silverthorne on the Blue River, Durango on the Animas River, and Avon on the Eagle River were decreed based on settlements with all the objecting parties. In 2014 decrees were entered based on settlement of major RICD appropriations on the Roaring Fork (applications by Carbondale and Pitkin County and the Colorado River mainstem (Grand County’s application involving two whitewater parks). These negotiated agreements have produced detailed terms and conditions that are set forth in the resulting decrees.

The record of settlements beginning in 2006 seems to reflect a greater acceptance of RICO claims by the CWCB. The agency spent years as the chief


201. See Porzak et al., supra note 4, at 251–54. The much smaller Pueblo RICO right (maximum flow 500 cfs), on the Arkansas River downstream of Chaffee County, was also entered in 2006 on the basis of stipulations with the objectors. Findings of Fact, Conclusions of Law, and Decree at 8, In re Water Rights of Pueblo, Case No. 01CW160 (Colo. Dist. Ct., Water Div. 2, April 5, 2006) (decree entered into based on compromise and settlement).


203. Findings of Fact, Conclusions of Law, Judgment and Decree at 2, In re Water Rights of the City of Durango, No. 06CW9 (Colo. Dist. Ct., Water Div. 7, Nov. 30, 2007) (Durango has entered into stipulations with all objectors).


207. Findings of Fact, Conclusions of Law, Judgment and Decree at 20, In re Water Rights of the Bd. of Comm’rs for the Cty. of Grand, No. 2010CW298 (Colo. Dist. Ct., Water Div. 5, Jan. 10, 2014) (“The findings of fact, conclusions of law and decree in this matter were completed as a result of substantial discussions, negotiations, and compromises by, between and among the Applicant and several objectors pertaining to all parts of the findings, conclusions and decree”).

opponent of new RICD claims in the water courts\textsuperscript{209} and, along with the State Engineer, was the appellant in all of the Colorado Supreme Court’s RICD cases.\textsuperscript{210} To this day the CWCB seemingly remains unhappy about the established RICD rights.\textsuperscript{211} But over the past several years the agency has been willing to accept new decrees on the basis of terms and conditions that allow for desired upstream development,\textsuperscript{212} indicating that its approach to RICDs has shifted from determined opposition to pragmatic engagement. Indeed, the CWCB’s original draft Colorado Water Plan called RICDs “important, effective tools” for meeting recreational water needs, and stated that the agency would “continue to support local governments on [RICDs] through technical consultation and funding where appropriate.”\textsuperscript{213} The development-oriented

\textsuperscript{209.} The CWCB and State Engineer continued to oppose Golden’s application after all the water users had settled with the city, based on the agencies’ “firm position that in-channel water rights for recreation purposes could not be decreed to the City under Colorado law. As one State witness explained, the only acceptable term and condition ever offered by the State in settlement was that Golden withdraw the application.” Porzak et al., supra note 4, at 216. The CWCB also pushed for denial of the Upper Gunnison application in the water court, see supra notes 123–127 and accompanying text, and fought hard against the Steamboat Springs claim: “The CWCB’s strategy was clear—not only kill the Steamboat RICD, but at the same time make the litigation process as expensive as possible.” Porzak et al., supra note 4, at 244. In that article, Glenn Porzak and his co-authors—attorneys who were probably the leading proponents of RICD claims—repeatedly portrayed the CWCB as their primary antagonist. See id. at 243–47 (describing the CWCB’s opposition to the Steamboat claim as “vehement” and “strident”), 249 (criticizing rules adopted by the CWCB as “an astonishing action by a board that had just been reprimanded by the Colorado Supreme Court” in the Upper Gunnison case, but “entirely consistent with the CWCB’s behavior in its publicly-funded campaign against recreation water rights”). The CWCB did, however, settle with Longmont in 2004 on its substantial RICD claim on St. Vrain Creek. See Findings of Fact, Conclusions of Law and Ruling of the Referee and Decree of the Water Court, at 7, In re Water Rights of the City of Longmont, No. 2001CW275 (Colo. Dist. Ct., Water Div. 1, Dec. 7, 2004).

\textsuperscript{210.} See supra notes 104–109 and accompanying text (appeals of the Golden, Vail, and Breckenridge decrees), 128–139 and accompanying text (appeal of the Upper Gunnison decree).

\textsuperscript{211.} The only commentary on RICDs currently posted on the CWCB website is the following: “The size and magnitude of flows protected by many of the RICD water rights to date have the potential to restrict future upstream development potential and may reduce the flexibility that Colorado has to manage its water resources.” Recreational In-Channel Diversions, COLO. WATER CONVERSATION BD., http://cwcb.state.co.us/environment/recreational-in-channel-diversions/Pages/main.aspx (last visited Feb. 11, 2015). Otherwise the CWCB web pages on RICDs focus almost entirely on the existing statutes, rules, and decrees.

\textsuperscript{212.} Although Longmont’s application was settled earlier, see supra note 200, the much larger Chaffee County claim was perhaps the earliest instance of the CWCB accepting a negotiated agreement on a major new RICD decree. See Porzak et al., supra note 4, at 251–54 (describing terms and conditions of the negotiated decree accepted by the CWCB). More recent examples include the Pitkin County application on the Roaring Fork and Grand County’s application on the Colorado. Findings of Fact, Conclusions of Law, and Decree at 2, In re Water Rights of the Bd. of Cty. Comm’rs of Pitkin Cty., No. 2010CW305 (Colo. Dist. Ct., Water Div. 5, June 12, 2014); Findings of Fact, Conclusions of Law, Judgment and Decree at 20, In re Water Rights of the Bd. of Comm’rs for the Cty. of Grand, No. 2010CW298 (Colo. Dist. Ct., Water Div. 5, Jan. 10, 2014).

\textsuperscript{213.} COLO. WATER CONSERVATION BD., COLORADO’S WATER PLAN 81, 266 (2015) (first draft) (on file with author).
CWCB\textsuperscript{214} may never be a booster of RICDs, but it now appears increasingly willing to accept their existence and even acknowledge their value. While RICD activity has slowed in the courts, it has stopped in the legislature. Not only has no new RICD statute been enacted since SB 37, but it also appears that no substantive bill on this subject has even been introduced since 2006.\textsuperscript{215} With new applications in the following years few and far between,\textsuperscript{216} there has seemingly been little need or urgency for new legislation. SB 37, which tackled a controversial topic and passed with only a handful of dissenting votes,\textsuperscript{217} appears to be the kind of finely balanced policy deal\textsuperscript{218} that stands the test of time. After passing two significant bills in six years which created and fine-tuned the law on water rights for whitewater courses, the legislature has not returned to the issue for nearly a decade.

Thus, the legal and policy debates in Colorado over the legitimacy and size of whitewater park water rights have subsided. Since 2001 state law specifically allows for these rights while limiting them to local governments. Today, there is a substantial number of decreed RICD water rights scattered across the state, but there have been few new applications in recent years. For the past decade, RICD claims have been resolved on the basis of negotiated agreements rather than trials. And since the compromise amendments to the RICD statute of 2006, all has been quiet on the legislative front. In sum, Colorado has accepted the idea of water rights for whitewater parks, giving communities the option of securing an appropriation for recreational flows that can boost their economy and quality of life. Part IV offers some observations about Colorado's experience with the issue of in-channel water rights for recreation.

\textsuperscript{214} See supra notes 57–63 and accompanying text (describing the water development focus of the CWCB's authorizing statute).


\textsuperscript{216} Of the few new applications filed since 2006, all have been in the same court (Water Division 5), and all but one involved the same river, the Colorado. The other, from Pitkin County, was on the Roaring Fork, where there was already one decreed RICD right (Aspen's) and one pending application (Carbondale's) at the time of filing. CWCB 2014 RICD spreadsheet, supra note 179. If the new applications had involved rivers in different parts of the state, especially in areas with no prior experience with RICDs, they might have generated greater concern.

\textsuperscript{217} See supra note 151 and accompanying text.

\textsuperscript{218} "As the bill was finally enacted, everyone seemed to feel it was an acceptable compromise." Porzak et al., supra note 4, at 256.
IV. CONCLUDING OBSERVATIONS ON WHITWATER PARK WATER RIGHTS IN COLORADO

Water rights for whitewater parks have become established in Colorado but are still unknown in the other western states. The fact that Colorado, with its distinctly old-school approach to water law, remains the only state to recognize these rights is either deeply ironic or entirely fitting, depending on one's view of whitewater parks. If one sees them as representing modern values regarding the public amenities that people want from rivers, then it seems bizarre that water rights for recreational boating originated in Colorado, given its constitutional right to appropriate, its emphasis on property rights, and its lack of public interest standards for appropriation. If one sees them instead as water infrastructure that supports economic activity by drawing people and money to a community, then Colorado— with its utilitarian, user-driven water law and its important recreational economy—is the natural pioneer for this new type of water right.

Ironic or not, whitewater park water rights would not have developed as they did if not for Colorado’s unique approach to new appropriations. In other western states, any new appropriation requires a permit issued by a state agency, and the agency must determine that the application meets certain statutory criteria. Had applicants in Colorado needed the assent of a state agency for their whitewater park claims, they would have been disappointed, at least if they sought to appropriate high flows. And in most states, had the responsible water agency denied a requested permit or issued it for much lower flows than requested, any judicial review would likely have proceeded under the deferential standards that typically apply to this type of administrative decision. As it was, Colorado’s agencies strongly opposed the early high-flow claims by Golden, Steamboat Springs, and others, but because the agencies had only fact-finding and advisory roles, they had limited influence in the water courts. And while the agencies were concerned about the potential impact of RICO rights on future upstream uses, the water courts were precluded by statute and judicial precedent from considering such “public interest” arguments. Instead, the water courts applied the statutes, determined that whitewater parks would indeed “control”

219. GETCHES, supra note 28, at 151 (noting that all prior appropriation states except Colorado require a permit), 155-56 (outlining typical statutory criteria for issuance of permit).

220. The agencies might have been willing to approve applications for low flow levels, as indicated by the CWCB’s settlement with Fort Collins. See supra note 75 and accompanying text. The CWCB also eventually stipulated to the entry of a decree in the next application for in-channel recreational rights, whereby the City of Littleton appropriated a very modest 100 cfs for each of the three boat chutes on the South Platte River. Findings of Fact, Conclusions of Law, Ruling of the Referee and Decree of the Water Court at 4, In re Water Rights of the City of Littleton, No. 94CW273 (Colo. Dist. Ct., Water Div. 1, Sept. 7, 2000) (water court decree entered Sept. 29, 2000).

221. See supra note 56 and accompanying text (noting deferential standards applied by courts reviewing state water agency decisions in most other western states). The original version of SB 216 would have specified deferential standards for water court review of the CWCB’s decision on a RICO application. See supra note 112 and accompanying text.
water in its natural course for a recognized (and economically valuable) beneficial use, and issued decrees accordingly.

Fourteen years after Colorado's first RICO statute, no other western state has specifically recognized water rights for recreational boating courses, even though engineered whitewater parks exist in at least five other western states. For now, the other states are following western water law orthodoxy, taking the view that whitewater parks might be valuable, but that they do not and should not have water rights. Under this view, allowing local governments to appropriate high flows for recreation is bad policy, because it may foreclose opportunities for consumptive water development later on. These arguments are important in Colorado, which is fully and deeply committed to protecting its ability to use all of the water to which it is entitled under various interstate compacts. But remarkably, these arguments did not stop the water courts from decreeing whitewater park appropriations or stop the legislature from recognizing RICOs by statute. The 2006 legislation did require denial of any new RICO right that would "materially impair" Colorado's ability to use its compact entitlements, clearly showing that even future consumptive uses of water take priority over recreational uses. But rather than prohibit RICO claims entirely for that reason, the legislature chose to impose an additional standard on them, which has not prevented local governments from making significant new appropriations for whitewater parks.

Western water law has always rewarded the application of water to some economically productive beneficial use, and in Colorado, early applicants for recreational water rights strongly emphasized the economic importance of whitewater parks for their communities. Western water orthodoxy might

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222. See Whitewater Kayak Parks, BORNTOPADDLE.COM, http://www.bomtopaddle.com/whitewaterparks.php (last visited Feb. 13, 2015) (listing whitewater parks in Montana, Nevada, Utah, Wyoming, and several in Colorado). This list is certainly incomplete, however, as it excludes several of Colorado's parks, including popular ones in Salida and Durango. It also does not include a relatively new whitewater park on the Boise River in Idaho. See Welcome to the Boise River Park, BOISE RIVER PARK, http://www.boiseriverpark.com (last visited Feb. 13, 2013). It does not appear that there is a complete list of whitewater parks in the West, but clearly they are not unique to Colorado.

223. Protecting the state's compact entitlements remains a top priority of Colorado water policy. For example, in his executive order directing the CWCB to begin developing the first Colorado Water Plan, Governor John W. Hickenlooper noted, "Our interstate water concerns are as pressing as ever and require Colorado to be vigilant in protecting its interstate water rights pursuant to its nine interstate compacts and two equitable apportionment decrees." COLO. WATER CONSERVATION BD., supra note 3, at app. A at 3. The draft plan itself leaves no doubt about the central importance of this point: "The goals of the water plan are to defend Colorado's compact entitlements, improve the regulatory processes, and explore financial incentives all while honoring Colorado's water values and ensuring that the state's most valuable resource is protected and available for generations to come." Id. at 6.

224. See supra note 159 and accompanying text.

225. Porzak et al., supra note 4, at 218–19 (presenting economic argument for Golden application, including an estimate of $23 million in economic value). In arguing for the economic importance of whitewater courses for the mountain towns of Vail and Breckenridge, the attorney for these applicants told the Colorado Supreme Court, "[T]he greater the flow, the greater the dough, for the State as a whole." Id. at 237.
admit that such recreational uses are economically and legally beneficial but still reject the idea of appropriations for whitewater parks, perhaps because they lack a typical diversion or because they require too much water. In other words, traditional western water law would say that whitewater parks might be valuable, but they can’t have water rights. The practical problem with that view is that western water law based on prior appropriation focuses on water rights to the exclusion of nearly everything else, and offers little or no protection to those who lack them. It is said that when the only tool one has is a hammer, every problem starts to look like a nail. And so long as the western states continue to see water management solely as a matter of water rights, those who need water for economically valuable uses have little choice but to pursue such rights, as Colorado’s local governments have done for their whitewater parks.

Given that Colorado’s courts began recognizing in-channel recreational water rights even before the 2001 RICD statute, it is possible that whitewater park appropriations could be secured under existing law in other states. To answer that question for any given state would require a detailed analysis of that state’s water statutes, case law, and administrative rules and precedent, even before addressing the site-specific questions that would arise in connection with an application for a particular whitewater park. In general, however, the questions in any state would be much the same: (1) Is recreational boating a beneficial use? (2) Do in-channel structures creating whitewater features satisfy any legal requirements for diverting or controlling water? (3) Would the proposed use of water harm the public interest?

Starting with Fort Collins, the Colorado courts were able to answer the first two questions affirmatively, but did not address the third because that state lacks a public interest test for new appropriations. On the first two issues, the water agencies and courts of other states might consider Fort Collins at least somewhat persuasive; on the public interest point, Colorado’s legislative recognition of RICDs might help make the case that whitewater park rights are sound policy. That said, although the Colorado experience is relevant for other parts of the West, other states will recognize whitewater park water rights only if they make sense at the local level. Thus, proponents across the region might be best served by emphasizing (as Colorado’s applicants did) that whitewater parks are economically valuable, nonconsumptive, popular, and good for the communities in which they are located.

Colorado’s experience strongly suggests that whitewater parks can be successfully integrated into the water rights framework of a western state that follows the prior appropriation doctrine. Whitewater recreation would represent a new type of claim on water resources (although not a new use), but water rights for this purpose would be both nonconsumptive and very junior in priority.\textsuperscript{226}

\textsuperscript{226} Because of their junior priorities, whitewater park rights would be less potentially disruptive than reserved water rights under the \textit{Winters} doctrine, which apply to federal and tribal lands designated by the U.S. government for a particular purpose. Because reserved rights typically have a priority date
The quantities involved may be substantial, but would not necessarily disrupt existing water management practices, especially in areas where downstream senior rights already require large volumes of water to pass through the whitewater park. 227 And while recreational rights could potentially limit or complicate upstream water development actions, Colorado has shown that these concerns can be managed through statutory requirements for new claims, as well as through case-by-case negotiations to resolve issues arising from a particular appropriation.

For now, Colorado remains the only state to allow local governments to obtain water rights for whitewater parks, even though communities elsewhere in the West have invested in these courses. More of these parks may spring up as communities look to attract recreational visitors and diversify their economies. If whitewater parks grow in popularity and in economic value, can western water law accommodate them with water rights geared to their needs? That challenge will test the flexibility and adaptability of prior appropriation, which has been touted for its ability to change with the times. 228 The Colorado experience is instructive, as RICD water rights over the past decade have gone from being hotly disputed to generally accepted. To use a kayaking metaphor, whitewater park rights have successfully run a string of tough rapids, and are now floating through calmer waters.

tied to the date of the federal designation, these rights may be senior to some established uses, such that recognizing reserved rights may pose a threat to existing junior users who may lose water to a new senior call. See GETCHES, supra note 28, at 332 (explaining how reserved water rights may have earlier priority dates than established uses under prior appropriation).

227. The water courts made a point of this factor in issuing the Golden and Steamboat Springs RICO decrees, which involved high flow levels on Clear Creek and the Yampa River, respectively. In the Golden case, the water court noted that the water claimed for the city's kayak course would always be available for downstream uses, and found, "[i]n a dry water year, 100 [percent] of the water claimed for the Course is already subject to a downstream senior call. In an average water year, 84% of the water that passes through the Golden Course is subject to such a call." In re Water Rights of the City of Golden, No. 98CW448, slip op. at 7 (Colo. Water Div. 1, June 13, 2001). And the water court concluded that the Steamboat Springs appropriation would be "a new, clean use of water on top of, and that works in tandem with, existing and future downstream diversions." Amended Findings of Fact, Conclusions of Law and Decree of the Court at 7, In re Water Rights of the City of Steamboat Springs, No. 03CW86 (Colo. Dist. Ct., Water Div. 6, Mar. 13, 2006).

228. As Colorado Supreme Court Justice Greg Hobbs wrote, "State water law systems are continually evolving to incorporate the changing customs and values of the people." Gregory J. Hobbs, Jr., Priority: The Most Misunderstood Stick in the Bundle, 32 ENVTL. L. 37, 55 (2002); see also A. Dan Tarlock, The Future of Prior Appropriation in the New West, 41 NAT. RESOURCES J. 769, 770 (2001) (noting that prior appropriation has always changed with the times).

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