

Appendix 2.5 Recreational In-channel Diversions (RICDs)

Since 1969, and prior to institution of Colorado’s instream flow program, it has been possible for any individual or entity to legally obtain a water right that would keep water within the river channel by “impoundment” for “recreational purposes, including fishery and wildlife.”¹ Since the law did not define “impoundment,” water courts generally granted water decrees for recreational purposes if the appropriation fell within the legal definition of a “diversion”² (either “removing water from its natural course or location, or controlling water in its natural course or location, by means of a control structure, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device”).³ This water rights option was validated in 1992, when the Colorado Supreme Court, in the case of *City of Thornton v. City of Fort Collins*, held that “[a]lthough 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.”⁴

In 2001 the General Assembly clarified the practice, identifying such appropriations as “recreational in-channel diversions” (RICDs) and strictly limited their availability to counties, municipalities, water districts, water and sanitation districts, water conservation districts, and water conservancy districts.⁵ RICDs are functionally similar to instream flow rights in that they allow the appropriation of an amount of streamflow for use within the river channel.⁶ Unlike instream flow rights, however, RICDs require that the flow be “diverted, captured, controlled, and placed to beneficial use between specific points defined by control structures.”⁷ Further, RICD water rights are limited to the minimum amount of stream flow necessary to produce a “reasonable recreational experience.”⁸

In practice, most recreational in-channel diversion rights are used by cities to preserve adequate flows for whitewater floating and engineered whitewater kayak parks.⁹ However, because the original 2001 legislation did not define “reasonable recreational experience,” this aroused fear that RICDs would limit future water development in Colorado.¹⁰ The General Assembly responded in 2006 by passing Senate Bill 06-037, which limited the “reasonable recreational experience” for RICDs to “nonmotorized boating.”¹¹ “Other recreational activities may occur but may not serve as evidence of a reasonable recreation experience”.¹² Senate Bill 06-037 also limited the applicability of RICDs to April 1 to Labor Day of each year, “unless the applicant can demonstrate that there will be demand for the reasonable recreation experience on additional

¹ Colo. Rev. Stat. § 37-92-103(4) (Lexis 2006).

² See *Bd. of Co. Commrs. v. Upper Gunnison River Water Conserv. Dist.*, 838 P. 2d 840, 854 (Colo. 1992).

³ Colo. Rev. Stat. § 37-92-103(7) (Lexis 2006).

⁴ 830 P.2d 915, 931 (Colo. 1992).

⁵ Colo. Sen. 01-216, 63rd Gen. Assembly, 1st Reg. Sess. (June 5, 2001).

⁶ Colo. Rev. Stat. § 37-92-103(10.3) (Lexis 2006).

⁷ *Id.*

⁸ *Id.*

⁹ Reed D. Benson, “Adequate Progress,” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws Since 2000*, 36 *Envtl. L.* 1283, 1296 (2006).

¹⁰ *Id.* at 1309 n. 91.

¹¹ Colo. Sen. 06-037, 65th Gen. Assembly, 2d Reg. Sess. (May 11, 2006).

¹² *Id.*

days”.¹³ Most importantly, the measure prohibited owners of large RICDs (those with a total volume of water that exceeds 50 percent of the average historical volume of water for the stream segment), from placing a call on the river unless the call will produce at least 85 percent of the RICD’s decreed flow rate.¹⁴

Another check on RICDs is the Colorado Water Conservation Board’s ability to review all applications for such rights and independently make specific findings of fact that are presented to the water court for consideration in the final decree.¹⁵ CWCB must determine, among other findings, whether the proposed RICD would “materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements”.¹⁶ If the water court accepts a determination by the CWCB that a proposed RICD would in fact materially impair the State’s ability to fully develop its compact entitlements, then the application will be denied.¹⁷ While there is no legislative mandate for the water court to adopt CWCB’s findings of fact, the law does state that the CWCB’s findings of fact “shall be presumptive as to such facts, subject to rebuttal by any party”.¹⁸

While a number of statutory restrictions limit the applicability and extent of RICDs, these “quasi-instream flow rights” nevertheless provide a means to ensure that water remains in streams and lakes. RICDs are another example of the ability of Colorado water law to evolve in response to new and competing interests with traditional beneficial uses.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Colo. Sen. 01-216, 63rd Gen. Assembly, 1st Reg. Sess. (June 5, 2001).

¹⁶ *Id.* at (6)(b)(I).

¹⁷ Colo. Rev. Stat. § 37-92-305(13)(c) (Lexis 2006).

¹⁸ *Id.* at (13)(a).