

Second Regular Session
Sixty-fifth General Assembly
STATE OF COLORADO

REREVISED

*This Version Includes All Amendments
Adopted in the Second House*

LLS NO. 06-0136.01 Thomas Morris

SENATE BILL 06-037

SENATE SPONSORSHIP

Isgar,

HOUSE SPONSORSHIP

Curry,

Senate Committees

Agriculture, Natural Resources & Energy

House Committees

Agriculture, Livestock, & Natural Resources

A BILL FOR AN ACT

101 **CONCERNING THE ADJUDICATION OF RECREATIONAL IN-CHANNEL**
102 **DIVERSIONS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Water Resources Review Committee. Modifies the requirements applicable to the adjudication of a recreational in-channel diversion ("RICD") by:

Deleting 2 of the required factors and the discretionary factor with regard to which the Colorado water conservation board was required to make findings of fact;
Deleting the requirement that the board make a

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate deletions from existing statute.

HOUSE
3rd Reading Unamended
April 27, 2006

HOUSE
Amended 2nd Reading
April 24, 2006

SENATE
3rd Reading Unamended
March 3, 2006

SENATE
Amended 2nd Reading
March 2, 2006

recommendation regarding whether the application should be denied, granted, or granted with conditions;
Changing the definitions of "recreational in-channel diversion" and "diversion" and adding definitions of "control structure" and "reasonable recreation experience".
Limits the definition of "reasonable recreation experience" to kayaking;
Requiring the water court to make specific findings regarding the application;
Limiting the use of RICDs to specified hours from April 1 to Labor Day and specifying that a call will be administered only if it results in delivery of at least 90% of the decreed rate of flow for the applicable time period; and
Requiring the water court to retain jurisdiction for at least 20 years to allow reconsideration of the decree.

Applies the act only to applications for and the administration of new RICDs filed on or after the effective date of the act.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** 37-92-102 (6) (a), (6) (b), and (6) (c), Colorado
3 Revised Statutes, are amended to read:

4 **37-92-102. Legislative declaration - basic tenets of Colorado**
5 **water law.** (6) (a) ~~Following a public hearing, if requested by any party,~~
6 ~~the board shall make findings of fact and a final recommendation as to~~
7 ~~whether the application should be granted, granted with conditions, or~~
8 ~~denied.~~

9 (b) ~~In determining whether the board shall recommend that the~~
10 ~~water court grant, grant with conditions, or deny such application,~~ The
11 board, AFTER DELIBERATION IN A PUBLIC MEETING, shall consider the
12 following factors and make written findings ~~thereon~~ AS TO EACH:

13 (I) Whether the adjudication and administration of the recreational
14 in-channel diversion would MATERIALLY impair the ability of Colorado
15 to fully develop and place to consumptive beneficial use its compact
16 entitlements;

- 1 (II) ~~The appropriate reach of stream required for the intended use;~~
- 2 (III) ~~Whether there is access for recreational in-channel use;~~
- 3 (IV) Whether exercise of the recreational in-channel diversion
- 4 would cause material injury to instream flow water rights appropriated
- 5 pursuant to subsections (3) and (4) of this section; AND
- 6 (V) Whether adjudication and administration of the recreational
- 7 in-channel diversion would promote maximum utilization of waters of the
- 8 state. ~~as referenced in paragraph (a) of subsection (1) of this section; and~~
- 9 (VI) ~~Such other factors as may be determined appropriate for~~
- 10 ~~evaluation of recreational in-channel diversions and set forth in rules~~
- 11 ~~adopted by the board, after public notice and comment.~~

12 (c) Within ninety days after the filing of statements of opposition,

13 the board shall report its findings to the water court for review pursuant

14 to section 37-92-305 (13). The board may ~~defend such findings through~~

15 ~~participation~~ FULLY PARTICIPATE in the water court proceedings.

16 **SECTION 2.** 37-92-103 (7) and (10.3), Colorado Revised

17 Statutes, are amended, and the said 37-92-103 is further amended BY

18 THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to

19 read:

20 **37-92-103. Definitions.** As used in this article, unless the context

21 otherwise requires:

22 (6.3) "CONTROL STRUCTURE" MEANS A STRUCTURE CONSISTING OF

23 DURABLE MAN-MADE OR NATURAL MATERIALS THAT HAS BEEN PLACED

24 WITH THE INTENT TO DIVERT, CAPTURE, POSSESS, AND CONTROL WATER IN

25 ITS NATURAL COURSE FOR AN APPROPRIATOR'S INTENDED AND SPECIFIED

26 RECREATIONAL IN-CHANNEL DIVERSION. THE CONTROL STRUCTURE AND

27 ITS EFFICIENCY SHALL BE DESIGNED BY A PROFESSIONAL ENGINEER, AS

1 THAT TERM IS DEFINED IN SECTION 12-25-102, C.R.S., OR UNDER THE
2 DIRECT SUPERVISION OF A PROFESSIONAL ENGINEER, AND CONSTRUCTED
3 SO THAT IT WILL OPERATE EFFICIENTLY AND WITHOUT WASTE TO PRODUCE
4 THE INTENDED AND SPECIFIED REASONABLE RECREATION EXPERIENCE.
5 CONCENTRATION OF RIVER FLOW BY A CONTROL STRUCTURE CONSTITUTES
6 CONTROL OF WATER FOR A RECREATIONAL IN-CHANNEL DIVERSION.

7 (7) "Diversion" or "divert" means removing water from its natural
8 course or location, or controlling water in its natural course or location,
9 by means of a CONTROL STRUCTURE, ditch, canal, flume, reservoir,
10 bypass, pipeline, conduit, well, pump, or other structure or device; except
11 that, ON AND AFTER JANUARY 1, 2001, only a county, municipality, city
12 and county, water district, water and sanitation district, water
13 conservation district, or water conservancy district may FILE AN
14 APPLICATION TO control water in its natural course or location BY MEANS
15 OF A CONTROL STRUCTURE for recreational in-channel diversions. ~~This~~
16 ~~does not apply to applications filed prior to January 1, 2001.~~

17 (10.1) "REASONABLE RECREATION EXPERIENCE" MEANS THE USE
18 OF A RECREATIONAL IN-CHANNEL DIVERSION FOR, AND LIMITED TO,
19 NONMOTORIZED BOATING. OTHER RECREATIONAL ACTIVITIES MAY OCCUR
20 BUT MAY NOT SERVE AS EVIDENCE OF A REASONABLE RECREATION
21 EXPERIENCE.

22 (10.3) "Recreational in-channel diversion" means the minimum
23 AMOUNT OF stream flow as it is diverted, captured, controlled, and placed
24 to beneficial use between specific points defined by ~~physical~~ control
25 structures pursuant to an application filed by a county, municipality, city
26 and county, water district, water and sanitation district, water
27 conservation district, or water conservancy district for a reasonable

1 recreation experience in and on the water FROM APRIL 1 TO LABOR
2 DAY OF EACH YEAR UNLESS THE APPLICANT CAN DEMONSTRATE THAT
3 THERE WILL BE DEMAND FOR THE REASONABLE RECREATION EXPERIENCE
4 ON ADDITIONAL DAYS. THE RECREATIONAL IN-CHANNEL DIVERSION SHALL
5 BE LIMITED TO ONE SPECIFIED FLOW RATE FOR EACH TIME PERIOD CLAIMED
6 BY THE APPLICANT. INDIVIDUAL TIME PERIODS SHALL NOT BE SHORTER
7 THAN FOURTEEN DAYS UNLESS THE APPLICANT CAN DEMONSTRATE A NEED
8 FOR A SHORTER TIME PERIOD. THERE SHALL BE A PRESUMPTION THAT
9 THERE WILL NOT BE MATERIAL INJURY TO A RECREATIONAL IN-CHANNEL
10 DIVERSION WATER RIGHT FROM SUBSEQUENT APPROPRIATIONS OR
11 CHANGES OF WATER RIGHTS IF THE EFFECT ON THE RECREATIONAL
12 IN-CHANNEL DIVERSION CAUSED BY SUCH APPROPRIATIONS OR CHANGES
13 DOES NOT EXCEED ONE-TENTH OF ONE PERCENT OF THE LOWEST DECREED
14 RATE OF FLOW FOR THE RECREATIONAL IN-CHANNEL DIVERSION AS
15 MEASURED AT THE RECREATIONAL IN-CHANNEL DIVERSION AND THE
16 CUMULATIVE EFFECTS ON THE RECREATIONAL IN-CHANNEL DIVERSION
17 CAUSED BY SUCH APPROPRIATIONS OR CHANGES DO NOT EXCEED TWO
18 PERCENT OF THE LOWEST DECREED RATE OF FLOW FOR THE RECREATIONAL
19 IN-CHANNEL DIVERSION MEASURED AT THE RECREATIONAL IN-CHANNEL
20 DIVERSION. THE OWNER OF A WATER RIGHT FOR A RECREATIONAL
21 IN-CHANNEL DIVERSION MAY NOT CALL FOR WATER THAT HAS BEEN
22 LAWFULLY STORED BY ANOTHER APPROPRIATOR.

23 SECTION 3. 37-92-305 (13), Colorado Revised Statutes, is
24 amended to read:

25 **37-92-305. Standards with respect to rulings of the referee and**
26 **decisions of the water judge.** (13) (a) The water court shall apply the
27 factors set forth in section 37-92-102 (6). All CONSIDER THE findings of

1 fact ~~contained in the recommendation of~~ MADE BY the Colorado water
2 conservation board PURSUANT TO SECTION 37-92-102 (6) (b) REGARDING
3 A RECREATIONAL IN-CHANNEL DIVERSION, WHICH FINDINGS shall be
4 presumptive as to such facts, subject to rebuttal by any party. IN
5 ADDITION, THE WATER COURT SHALL CONSIDER EVIDENCE AND MAKE
6 AFFIRMATIVE FINDINGS THAT THE RECREATIONAL IN-CHANNEL DIVERSION
7 WILL:

8 (I) NOT MATERIALLY IMPAIR THE ABILITY OF COLORADO TO FULLY
9 DEVELOP AND PLACE TO CONSUMPTIVE BENEFICIAL USE ITS COMPACT
10 ENTITLEMENTS;

11 (II) PROMOTE MAXIMUM UTILIZATION OF WATERS OF THE STATE;

12 (III) INCLUDE ONLY THAT REACH OF STREAM THAT IS APPROPRIATE
13 FOR THE INTENDED USE;

14 (IV) BE ACCESSIBLE TO THE PUBLIC FOR THE RECREATIONAL
15 IN-CHANNEL USE PROPOSED; AND

16 (V) NOT CAUSE MATERIAL INJURY TO INSTREAM FLOW WATER
17 RIGHTS APPROPRIATED PURSUANT TO SECTION 37-92-102 (3) AND (4).

18 (b) IN DETERMINING WHETHER THE INTENDED RECREATION
19 EXPERIENCE IS REASONABLE AND THE CLAIMED AMOUNT IS THE
20 APPROPRIATE FLOW FOR ANY PERIOD, THE WATER COURT SHALL CONSIDER
21 ALL OF THE FACTORS THAT BEAR ON THE REASONABLENESS OF THE CLAIM,
22 INCLUDING THE FLOW NEEDED TO ACCOMPLISH THE CLAIMED
23 RECREATIONAL USE, BENEFITS TO THE COMMUNITY, THE INTENT OF THE
24 APPROPRIATOR, STREAM SIZE AND CHARACTERISTICS, AND TOTAL
25 STREAMFLOW AVAILABLE AT THE CONTROL STRUCTURES DURING THE
26 PERIOD OR ANY SUBPERIODS FOR WHICH THE APPLICATION IS MADE.

27 (c) IF A WATER COURT DETERMINES THAT A PROPOSED

1 RECREATIONAL IN-CHANNEL DIVERSION WOULD MATERIALLY IMPAIR THE
2 ABILITY OF COLORADO TO FULLY DEVELOP AND PLACE TO CONSUMPTIVE
3 BENEFICIAL USE ITS COMPACT ENTITLEMENTS, THE COURT SHALL DENY
4 THE APPLICATION.

5 (d) IN ADDITION TO DETERMINING THE MINIMUM AMOUNT OF
6 STREAM FLOW TO SERVE THE APPLICANT'S INTENDED AND SPECIFIED
7 REASONABLE RECREATION EXPERIENCE, THE WATER COURT SHALL MAKE
8 A FINDING IN THE DECREE AS TO THE FLOW RATE BELOW WHICH THERE IS
9 NO LONGER ANY BENEFICIAL USE OF THE WATER AT THE CONTROL
10 STRUCTURES FOR THE DECREED PURPOSES.

11 (e) IF THE OTHER ELEMENTS OF THE APPROPRIATION ARE
12 SATISFIED, THE DECREE SHALL SPECIFY THE TOTAL VOLUME OF WATER
13 REPRESENTED BY THE FLOW RATES DECREED FOR THE RECREATIONAL
14 IN-CHANNEL DIVERSION. FOR PURPOSES OF THIS SUBSECTION (13), THE
15 "TOTAL VOLUME OF WATER REPRESENTED BY THE FLOW RATES DECREED
16 FOR THE RECREATIONAL IN-CHANNEL DIVERSION" MEANS THE SUM OF THE
17 FLOW RATES CLAIMED IN CUBIC FEET PER SECOND FOR EACH DAY ON
18 WHICH A CLAIM IS MADE MULTIPLIED BY 1.98.

19 (f) IF THE COURT DETERMINES THAT THE TOTAL VOLUME OF WATER
20 REPRESENTED BY THE FLOW RATES DECREED FOR THE RECREATIONAL
21 IN-CHANNEL DIVERSION EXCEEDS FIFTY PERCENT OF THE SUM OF THE
22 TOTAL AVERAGE HISTORICAL VOLUME OF WATER FOR THE STREAM
23 SEGMENT WHERE THE RECREATIONAL IN-CHANNEL DIVERSION IS LOCATED
24 FOR EACH DAY ON WHICH A CLAIM IS MADE, THE DECREE SHALL:

25 (I) SPECIFY THAT THE STATE ENGINEER SHALL NOT ADMINISTER A
26 CALL FOR THE RECREATIONAL IN-CHANNEL DIVERSION UNLESS THE CALL
27 WOULD RESULT IN AT LEAST EIGHTY-FIVE PERCENT OF THE DECREED FLOW

1 RATE FOR THE APPLICABLE TIME PERIOD;

2 (II) LIMIT THE RECREATIONAL IN-CHANNEL DIVERSION TO NO
3 MORE THAN THREE TIME PERIODS; AND

4 (III) SPECIFY THAT EACH TIME PERIOD IS LIMITED TO ONE FLOW
5 RATE.

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7 **SECTION 4. Applicability.** This act shall apply only to
8 applications for and the administration of new recreational in-channel
9 diversions filed on or after the effective date of this act and shall not
10 apply to applications for reasonable diligence or to make absolute
11 recreational in-channel diversions that were decreed or applied for prior
12 to the effective date of this act.

13 **SECTION 5. Safety clause.** The general assembly hereby finds,
14 determines, and declares that this act is necessary for the immediate
15 preservation of the public peace, health, and safety.