

Second Regular Session
Sixty-fifth General Assembly
STATE OF COLORADO

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

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.

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 SO
3 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, BETWEEN ONE HALF HOUR
2 AFTER SUNRISE TO ONE HALF HOUR AFTER SUNSET FROM APRIL 1 TO
3 LABOR DAY OF EACH YEAR. THE RECREATIONAL IN-CHANNEL DIVERSION
4 SHALL BE LIMITED TO ONE SPECIFIED FLOW RATE CLAIMED FOR EACH TIME
5 PERIOD UNLESS THE APPLICANT CAN DEMONSTRATE A NEED FOR UP TO
6 TWO ADDITIONAL FLOW RATES FOR EACH TIME PERIOD. THERE SHALL
7 BE A PRESUMPTION THAT THERE WILL NOT BE MATERIAL INJURY TO A
8 RECREATIONAL IN-CHANNEL DIVERSION WATER RIGHT FROM SUBSEQUENT
9 APPROPRIATIONS OR CHANGES OF WATER RIGHTS IF THE EFFECT ON THE
10 RECREATIONAL IN-CHANNEL DIVERSION CAUSED BY SUCH APPROPRIATIONS
11 OR CHANGES DOES NOT EXCEED ONE-TENTH OF ONE PERCENT OF THE
12 LOWEST DECREED RATE OF FLOW FOR THE RECREATIONAL IN-CHANNEL
13 DIVERSION AS MEASURED AT THE RECREATIONAL IN-CHANNEL DIVERSION
14 AND THE CUMULATIVE EFFECTS ON THE RECREATIONAL IN-CHANNEL
15 DIVERSION CAUSED BY SUCH APPROPRIATIONS OR CHANGES DO NOT
16 EXCEED TWO PERCENT OF THE LOWEST DECREED RATE OF FLOW FOR THE
17 RECREATIONAL IN-CHANNEL DIVERSION MEASURED AT THE RECREATIONAL
18 IN-CHANNEL DIVERSION. THE OWNER OF A WATER RIGHT FOR A
19 RECREATIONAL IN-CHANNEL DIVERSION MAY NOT CALL FOR WATER THAT
20 HAS BEEN LAWFULLY STORED BY ANOTHER APPROPRIATOR.

21 **SECTION 3.** 37-92-305 (13), Colorado Revised Statutes, is
22 amended to read:

23 **37-92-305. Standards with respect to rulings of the referee and**
24 **decisions of the water judge.** (13) (a) The water court shall ~~apply the~~
25 ~~factors set forth in section 37-92-102 (6).~~ All CONSIDER THE findings of
26 fact ~~contained in the recommendation of~~ MADE BY the Colorado water
27 conservation board PURSUANT TO SECTION 37-92-102 (6) (b) REGARDING

1 A RECREATIONAL IN-CHANNEL DIVERSION, WHICH FINDINGS shall be
2 presumptive as to such facts, subject to rebuttal by any party. In
3 ADDITION, THE WATER COURT SHALL CONSIDER EVIDENCE AND MAKE
4 AFFIRMATIVE FINDINGS THAT THE RECREATIONAL IN-CHANNEL DIVERSION
5 WILL:

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

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

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

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

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

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

25 (c) IF A WATER COURT DETERMINES THAT A PROPOSED
26 RECREATIONAL IN-CHANNEL DIVERSION WOULD MATERIALLY IMPAIR THE
27 ABILITY OF COLORADO TO FULLY DEVELOP AND PLACE TO CONSUMPTIVE

1 BENEFICIAL USE ITS COMPACT ENTITLEMENTS, THE COURT SHALL DENY
2 THE APPLICATION. IF THE DECREED VOLUME OF WATER FOR THE
3 RECREATIONAL IN-CHANNEL DIVERSION EXCEEDS THIRTY-FIVE PERCENT
4 OF THE TOTAL AVERAGE HISTORICAL VOLUME OF WATER FOR THE STREAM
5 SEGMENT WHERE THE RECREATIONAL IN-CHANNEL DIVERSION IS LOCATED
6 DURING ALL DAYS FOR WHICH THE RECREATIONAL IN-CHANNEL DIVERSION
7 IS CLAIMED, THE DECREE SHALL SPECIFY THAT THE STATE ENGINEER SHALL
8 NOT ADMINISTER A CALL FOR THE RECREATIONAL IN-CHANNEL DIVERSION
9 UNLESS THE CALL WOULD RESULT IN AT LEAST EIGHTY-FIVE PERCENT OF
10 THE DECREED RATE OF FLOW FOR ANY APPLICABLE TIME PERIOD. IF THE
11 TOTAL VOLUME REPRESENTED BY THE DECREED FLOW RATE FOR A
12 RECREATIONAL IN-CHANNEL DIVERSION EXCEEDS SUCH THIRTY-FIVE
13 PERCENT LIMIT, THE RECREATIONAL IN-CHANNEL DIVERSION SHALL
14 FURTHER BE LIMITED TO ONE SPECIFIED FLOW RATE FOR THE ENTIRE TIME
15 PERIOD OF THE RECREATIONAL IN-CHANNEL DIVERSION UNLESS THE
16 APPLICANT CAN DEMONSTRATE A NEED FOR UP TO TWO ADDITIONAL FLOW
17 RATES OR SHORTER TIME PERIODS.

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19 **SECTION 4. Applicability.** This act shall apply only to
20 applications for and the administration of new recreational in-channel
21 diversions filed on or after the effective date of this act and shall not
22 apply to applications for reasonable diligence or to make absolute
23 recreational in-channel diversions that were decreed or applied for prior
24 to the effective date of this act.

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