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Water Resources

Review Committee

Report to the
COLORADO
GENERAL ASSEMBLY

Colorado Legislative Council
Research Publication No. 548
December 2005

RECOMMENDATIONS FOR 2006

WATER RESOURCES REVIEW COMMITTEE

**Report to the
Colorado General Assembly**

**Research Publication No. 548
December 2005**

COLORADO GENERAL ASSEMBLY

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December 2005

To Members of the Sixty-fifth General Assembly:

Submitted herewith is the final report of the Water Resources Review Committee. This committee was created pursuant to Article 98 of Title 37, Colorado Revised Statutes. The purpose of this committee is to oversee the conservation, use, development, and financing of Colorado's water resources.

At its meeting on November 15, 2005, the Legislative Council reviewed the report of this committee. A motion to forward this report and the bills therein for consideration in the 2006 session was approved.

Respectfully submitted,

/s/ Senator Joan Fitz-Gerald
Chairman

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http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2005/05interim.htm

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WATER RESOURCES REVIEW COMMITTEE

Members of the Committee

Senator Jim Isgar
Chair

Senator Lewis Entz
Senator Joan Fitz-Gerald
Senator Dan Grossman
Senator Jack Taylor

Representative Kathleen Curry
Vice-Chair

Representative Dorothy Butcher
Representative Mary Hodge
Representative Diane Hoppe
Representative Al White

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EXECUTIVE SUMMARY

Committee Charge

The Water Resources Review Committee was created for the purposes of contributing to and monitoring the conservation, use, development, and financing of Colorado's water resources for the general welfare of the state (Section 37-98-102, C.R.S.). The committee is authorized to review and propose legislation in furtherance of its purposes. In conducting its review, the committee is required to consult with experts in the field of water conservation, quality, use, finance, and development. The committee was authorized to meet eight times in 2005, including two times outside of the interim period, and to take two field trips in connection with its mandate.

Committee Activities

The committee met seven times during the 2005 interim. At these hearings, the committee received briefings on a broad range of water policy issues from government officials, private water users, and other interested persons. Specifically, it received briefings on proposed water development projects, water delivery obligations to downstream states, impacts from oil and gas operations on ground water resources, and endangered species recovery programs.

Update on statutory water studies. The Colorado Water Conservation Board provided an update on Phase II of its Statewide Water Supply Initiative. Authorized by Senate Bill 05-84, this study seeks to identify water supply programs that will address the future water shortfalls identified in Phase I of the study. The Colorado Department of Natural Resources' Executive Director provided an update on implementation of House Bill 05-1177 concerning interbasin compact negotiations. He explained that the process directed by the bill requires the use of information from the Statewide Water Supply Initiative to aid negotiations between water users seeking long-term water supply solutions.

Committee recommendation concerning water rights for recreation. The committee consulted with boaters and other water users about the growing demand for stream flows for recreational purposes, known as recreational in-channel diversions (RICDs). Boating advocates and environmentalists described the benefits provided by RICDs and expressed concern about limiting the use of water for recreational purposes. In contrast, water providers expressed concern about the impact of RICDs on their ability to supply water for their growing populations. Based on extensive discussions with experts and other interested persons, the committee recommends legislation to amend the requirements for obtaining a RICD.

Committee recommendation concerning the Colorado Water Resources and Power Development Authority. The committee also heard testimony about loan programs administered by the Colorado Water Resources and Power Development Authority (authority). Formed in 1981 to fund water development projects, the authority's duties were later expanded to include low-interest loan programs for government-owned water treatment and drinking water programs. To reflect the expanded duties, the committee recommends legislation to require the authority's board to include a member with expertise in public health issues related to waste water and drinking water treatment.

Committee tours. The committee took two tours and visited portions of three of the state's seven major river basins to learn about local water resources and supply challenges. In August, the committee toured for two days in northwestern Colorado including the Upper Colorado River and the Yampa-White Basins including an oil-shale research facility. It also held a meeting in Steamboat Springs to hear public testimony and discuss legislative proposals concerning RICDs. In September, the committee conducted a one-day tour of water diversion and storage facilities owned by the Farmers Reservoir and Irrigation Company in the South Platte River Basin and learned about a proposed underground water storage project near Greeley.

Committee Recommendations

As a result of committee discussion and deliberation, the committee recommends two bills to consider in the 2006 legislative session.

Bill A — Appointments to the Colorado Water Resources and Power Development Authority. The authority issues loans to governmental entities for water supply projects, waste water treatment, and drinking water projects. Its nine-member board is required to include individuals experienced in water development, project financing, and water law. Bill A requires that one board member be experienced in public health issues related to drinking water or water quality matters and reduces from two to one the number of members who must be experienced in the planning and development of water projects.

Bill B — Adjudication of Recreational In-channel Diversions (RICD). Bill B amends the requirements for obtaining a water right decree for RICDs. It limits the Colorado Water Conservation Board's review of RICD applications and imposes construction requirements on these water diversion structures. The bill limits the types of water-based recreation that may qualify for a RICD to kayaking. It also limits the administration of stream flows for a RICD to the daylight hours during the period from April 1 to Labor Day and when stream flows are at least 90 percent of the decreed water right. The water court is required to retain jurisdiction over a RICD for at least 20 years in order to reconsider the decree if circumstances change regarding its use.

STATUTORY AUTHORITY AND RESPONSIBILITIES

Section 37-98-102, C.R.S., creates the Water Resources Review Committee. The committee is composed of five members from the House of Representatives and five members from the Senate. Up to eight meetings, two of which may be held during the legislative session, and two field trips are authorized to meet the purposes of the statute.

The committee is charged with contributing to and monitoring the conservation, use, development, and financing of the water resources of Colorado for the general welfare of its inhabitants and reviewing and proposing water resources legislation. The committee is to meet with experts in the field of water conservation, quality, use, finance, and development in furthering its charge.

COMMITTEE ACTIVITIES

Water Rights for Recreation

Water rights for white water recreation. Communities across Colorado have constructed white water parks to attract kayakers, rafters, and other white water users. In 1992, the Colorado Supreme Court granted a water right for the City of Fort Collins' boat chute on the Cache La Poudre River, the first such right granted in Colorado. Under Colorado's water law, called the doctrine of prior appropriation, a water right allows an owner to make an enforceable "call" during water shortages. Once a call is made, water use by junior water rights must be reduced until the senior water right has been satisfied. The priority of a water right is based on the initial date of a diversion from a stream. The earlier the date of the appropriation, the more "senior" the water right. A water right also provides certain legal protections for owners from impacts caused by changes of other water rights, such as changing the point of diversion on a stream. The State Engineer is charged with administering Colorado's rivers and streams to ensure that water diversions comply with the priority system.

The General Assembly enacted a law in 2001 that limits the ownership of recreational water rights to local governments. These water rights are called recreational in-channel diversions (RICDs). Diversions for RICDs and other beneficial uses are limited to the "amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is made." The law further defines a RICD as the minimum stream flow "diverted, captured, and controlled, and placed to a beneficial use between specific points defined by physical control structures."

The Colorado Water Conservation Board (CWCB) is required to review RICD applications and submit a written recommendation to the Water Court regarding the approval of the application. In making its recommendation, the CWCB is required to consider the effect of the RICD on Colorado's ability to use its entitlement as determined by interstate compact, the appropriateness of the RICD's stream segment, and its accessibility to users. The CWCB is also required to determine whether the RICD would promote maximum utilization of the state's waters and whether the RICD can be exercised without injuring other water rights. The law also establishes standards to guide the water court's review of RICD applications. The court must also consider the statutory standards by which the CWCB must review RICD applications. The CWCB's findings are presumed accurate unless proven otherwise. Finally, the court must determine whether the RICD application complies with the statutory definition of a RICD.

The committee heard testimony expressing concern that the law does not include sufficient conditions for ensuring that a RICD diversion is controlled and being used beneficially. For example, concerns were expressed that a RICD applicant may claim the entire available flow of a large stream while only part of the flow is needed for an adequate

boating experience. Most boaters use RICDs during the daylight hours and when weather permits. Concern was expressed that current law does not prohibit a RICD owner from calling for his or her water right at night or during the winter when there are few boaters to use the flow.

Committee recommendation. The committee recommends Bill B that amends the CWCB's review process of RICDs and imposes additional criteria to obtain new RICDs. Specifically, the bill adds criteria for constructing RICD control structures and limits to kayaking the type of boating that may qualify for such rights. Owners of RICDs are limited to calling for their water right during daylight hours and certain times of the year. The State Engineer is prohibited from administering a RICD if less than 90 percent of its decreed flow is unavailable. It also add additional criteria by which the water court reviews RICD applications and requires it to retain jurisdiction over the application for 20 years.

State Programs to Address Water Supply Challenges

Statewide Water Supply Initiative. The General Assembly commissioned the Statewide Water Supply Initiative in 2003 to identify and prepare for the state's long term water needs. The report was prepared by the CWCB and delivered to the General Assembly in December 2004. It identifies water needs in each of the state's eight major river basins and estimates water supply shortfalls based on planned projects and projected water demand. In 2005, the General Assembly appropriated additional money for the CWCB to continue the study. This money will assist water users in the river basins to examine and implement water supply options that address the gap between planned projects and future water needs. The process includes four technical round tables that will work with basin roundtables established in House Bill 05-1117. Each technical roundtable will address a specific water supply issue including water efficiency, alternatives to permanent agricultural dry ups, and prioritizing and quantifying recreational and environmental water needs.

The Statewide Water Supply Initiative estimated that Colorado's western slope population is projected to increase by 420,000 to almost 1 million in 2030; an increase of nearly 85 percent over the current population of 514,800. Colorado's Front Range and eastern plains population is project to grow by 2.4 million in 2030 to 6.2 million; an increase of 62 percent from the current population of 3,820,700. The shortfall between planned projects and estimated water demand is 10,300 acre feet on the western slope and 107,800 acre feet in the Front Range and eastern plains. An acre foot is the amount of water that will cover an acre of land at a depth of one foot, or 325,851 gallons. An official from the CWCB explained that a combination of water supply options may be needed to meet the shortfall including conservation, reuse, agricultural transfers, and development of new water supplies.

Interbasin compact negotiations. Water in Colorado is often moved from where it occurs naturally to where it is needed. Such movement may be miles from the originating stream or between major river basins. Proposals to move large amounts of water from one

river basin to another often result in expensive and time consuming litigation. In 2005, the General Assembly created a process in House Bill 05-1117 to help facilitate the movement of water to ensure that there is an adequate water supply to meet future water needs throughout the state. The committee was briefed on implementation of the new law that creates a roundtable in each of the state's major river basins and in the Denver metropolitan area. Each basin is authorized to select its members, adopt by-laws, assist with collaboration within a basin and between basins, and develop a basin water needs assessment.

The new law also created the Interbasin Compact Committee that is charged with negotiating interbasin compacts regarding use of Colorado's rivers within the state. The committee is authorized to establish a charter to guide negotiations between basin roundtables, conduct public education events, and make reports and recommendations annually to the General Assembly and the Governor. The nine basin roundtables appoint 18 members of the committee and the Governor appoints 6 at-large members with expertise in environmental, municipal, agricultural, industrial, and recreational matters. Also, the chairpersons of the House and Senate Agriculture and Natural Resources Committees each appoint one member to the Interbasin Compact Committee. The Director of Compact Negotiations, also appointed by the Governor, chairs the Interbasin Compact Committee.

Drafting of the committee's charter is tentatively scheduled to be completed by February 2006. The charter will then be submitted to the General Assembly for its approval prior to conclusion of the 2006 legislative session. House Bill 05-1177 is repealed if the Interbasin Compact Committee fails to submit the charter to the General Assembly by July 1, 2006.

Colorado Water Resources and Power Development Authority. The committee heard testimony from the authority regarding its loan programs for water supply projects. The authority is an independent public entity created by the General Assembly in 1981 to fund public water supply projects. It is authorized to issue revenue bonds that are the indebtedness of the authority and do not obligate the state or any political subdivision. As of September 2005, the authority had issued over \$1.3 billion in loans, mostly for public water pollution control and drinking water projects.

Water quality loan programs. In 1989, the authority was charged with issuing loans for water pollution control programs. The authority has provided approximately \$36 million to match over \$188 million in federal grants. The subsidized loans help finance public wastewater treatment facilities and other pollution abatement projects. As of September 2005, the authority had issued 109 loans representing over \$579 million for water pollution control projects. In 1995, the authority was charged with issuing loans for public drinking water programs. It has provided over \$17 million to match over \$97 million in federal grants for water treatment and other related infrastructure needed to comply with the federal Safe Drinking Water Act. As of September 2005, the authority has issued 64 loans totaling \$207 million for public drinking water programs.

The authority is governed by a nine-member board. Its members are appointed by the Governor for four-year terms to represent eight of the state's major river basins and the City and County of Denver. Members of the board are confirmed by the Senate. The committee heard testimony about the history of the authority and how its duties have been expanded to include loans for water quality projects. Currently, the board must include members experienced in water project planning and development, financing, and engineering. The board must also include a member with experience in water law. However, the board is not required to include a member experienced in public health issues related to water quality. The committee heard testimony about the need to add a member with the experience to review loan requests for water quality projects.

Committee recommendation. The committee recommends Bill A that requires the authority's board to include a member with expertise in public health issues related to wastewater and drinking water treatment and reduces from two to one the number of members who must be experienced in the planning and development of water projects.

Proposed Municipal Water Supply Projects

Colorado Springs and Aurora are two of Colorado's largest and fastest growing cities. Both cities testified about proposed water development projects to address their growing populations and improve water delivery during droughts.

Southern delivery system. The City of Colorado Springs provided an update on its proposed Southern Delivery System that will divert additional water from the Pueblo Reservoir that stores water from the Arkansas and Colorado Rivers. Phase I of the project includes construction of 43-mile pipeline and a water treatment facility that is estimated to cost \$500 million. The city is currently conducting an environmental impact assessment of the projects as required by federal law. The city testified that it is working with western Colorado water users to address their concerns about the impact of Southern Delivery System on their water resources. It is also working to address local concerns about water quality impacts to Fountain Creek related to the city's storm water run-off.

Lower south platte project. The City of Aurora's population is projected to increase by approximately 250,000 by 2040; an increase of over 80 percent from the city's current population of 300,000. To help supply these new residents, the city testified that it is working to extend its current water supply by increasing water conservation and implementing a water re-use program called the Lower South Platte Project. This project will enable the city to capture part of its water right that returns to the South Platte River after it has been used by the city. This water will then be treated and applied to another use. According to state law, only certain types of water may be reused including water that is introduced into a river basin from another basin or from nontributary ground water. Phase 1 of the South Platte Project includes additional storage near Aurora Reservoir to hold its reusable water right and a pipeline to move this water north to gravel storage lakes near Barr Lake. To help pay for the project, the city will raise its water service connection fee for single family homes to over \$16,000 in 2006.

Water Delivery Obligations to Downstream States

Approximately 10.2 million acre-feet of river water flows across Colorado's borders annually. Almost all of this water is legally obligated to 18 downstream states and Mexico by interstate compacts and federal court decisions. A compact is an agreement between two or more states that is approved by Congress. The committee was briefed on state programs designed to satisfy interstate water delivery obligations in the Colorado River Basin in western Colorado and the Republican River Basin in northeastern Colorado.

Colorado river basin issues. The Colorado River Compact regulates the use of water in the Colorado River Basin by Colorado and six other states including Arizona, California, Nevada, New Mexico, Utah, and Wyoming. An international treaty also determines the amount of Colorado River water that must be delivered to Mexico. Water delivery from the two major reservoirs on the Colorado River – Lake Powell in southern Utah and Lake Mead in northwestern Arizona – are controlled by the U.S. Department of Interior. Lake Powell serves as a water bank for Colorado and the other states in the Upper Colorado River Basin. Water shortages caused by the drought of 2002 prompted the states and the federal government to clarify policies concerning water deliveries from Lake Powell to the lower basin states and delivery obligations to Mexico. In August 2005, the seven basin states sent a letter to the Secretary of the U.S. Department of Interior outlining general issues of agreement between the states concerning operation of Lake Powell during water shortages and allocation of shortages to Mexico. It also describes efforts by the states to develop more comprehensive river management strategies to avoid future legal confrontations during water shortages and to help ensure that the states are allowed to use their compact entitlements.

Republican river basin issues. In 2002, Colorado settled a dispute with Kansas and Nebraska concerning the use of the water in the Republican River that is shared by the three states. The settlement agreement requires Colorado to limit its consumption of the river to the amounts allowed by the Republican River Compact beginning in 2008 based on a five-year running average. It also placed a moratorium on new groundwater development in the basin. Most of the water used in Colorado's portion of the basin is used by irrigators who pump groundwater that is connected to the Republican River. The Republican River Water Conservation District was created by law in 2004 to address water supply challenges in the Republican River Basin and to help Colorado comply with the settlement agreement. The district includes Sedgewick, Phillips, Yuma, Washington, Kit Carson, Logan, and Lincoln Counties in northeastern Colorado. There are approximately 570,000 acres of irrigated land in district. The committee was briefed on a program to reduce irrigation in the district that will use federal money to pay farmers to cease irrigating temporarily or permanently. Colorado is seeking to enroll approximately 5 percent of the irrigated land in the federal program in the next several years.

SUMMARY OF RECOMMENDATIONS

As a result of the committee's activities, the following bills are recommended to the Colorado General Assembly.

Bill A — Concerning the Appointment to the Colorado Water Resources and Power Development Authority Board of Directors of a Director Who is Experienced in Water Quality Matters

Bill A requires one member of the Colorado Water Resources and Power Development Authority be experienced in public health issues related to drinking water projects or water quality matters. It also reduces from two to one the number of members who must be experienced in the planning and development of water projects.

Bill B — Concerning the Adjudication of Recreational In-Channel Diversions

Under current law, the Colorado Water Conservation Board (CWCB) is required to review RICD applications and submit a written recommendation to the Water Court regarding the approval of the application. Bill B repeals the requirement that the CWCB make written findings about whether a RICD application is appropriate for a stream and whether boaters will have access. It also repeals the CWCB's authority to consider other factors established in rule. Bill B includes criteria for constructing RICD control structures to require that they be durable, professionally designed, and capable of controlling the RICD. It also limits to kayaking the type of boating that may qualify for an RICD. Current law does not specify the type of boating that may qualify for an RICD.

The definition of a RICD is amended to limit such diversions during daylight hours and from April 1 to Labor Day. New water diversions or changes of water rights are assumed not to injure a RICD if the effect is less than 0.5 percent of the lowest decreed flow of the RICD. Bill B requires the Water Court to determine whether a RICD will impair Colorado's ability to use its compact entitlement, promotes maximum use of the state's water, and determine other potential impacts. The Water Court is also required to retain jurisdiction over RICDs for 20 years. The State Engineer is charged with administering Colorado's rivers and streams to ensure that water diversions comply with the priority system. Bill B prohibits the State Engineer from administering calls for RICDs during water shortages unless at least 90 percent of the decreed flow is available. Bill B would apply to applications for RICDs filed on or after the date that the bill becomes law.

RESOURCE MATERIALS

The resource materials listed below were provided to the committee or developed by Legislative Council Staff during the course of the meetings. The summaries of meetings and attachments are available at the Division of Archives, 1313 Sherman Street, Denver, (303- 866-2055). The meeting summaries and materials developed by Legislative Council Staff are also available on our web site at:

http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2005/05interim.htm.

Meeting Summaries	Topics Discussed
July 20, 2005	Recreational In-channel Diversions (RICDs); implementation of House Bill 05-1177 concerning interbasin compacts.
August 25, 2005	RICDs.
September 7, 2005	Water supply issues in the Fraser River Basin; designing and constructing RICDs; Colorado Water Conservation Board review of RICDs, panel discussion on RICDs.
September 27, 2005	Regulation of water produced from oil and gas development.
October 5, 2005	State financing for water supply projects; water quality issues; water supply alternatives; update on the Southern Delivery System; southern metro water supply issues; discussion of proposed legislation.
October 6, 2005	Drought update; dam safety regulations; interstate compact issues on the Colorado River and the Republican River; regulation of well pumping in the South Platte River Basin; endangered species recovery programs.
October 26, 2005	Proposed South Platte Project; update on the Statewide Water Supply Initiative; operation of small ditch companies in an urbanizing environment; final action on draft legislation.

Committee Tours

Areas Visited

August 23 - 26, 2005

Colorado, Yampa, and White River Basins; Shell Oil's oil shale pilot project.

September 27, 2005

Farmers Reservoir and Irrigation Company (FRICO) water supply facilities in the South Platter River Basin.

Memoranda and Reports

Water and Wastewater Project Financing; Report prepared by the Colorado Water Resources and Power Development Authority, October 5, 2005.

Summary of Provisions of 2005 Water Legislation; Memorandum prepared by Legislative Council Staff, June 9, 2005.

Overview of Recreational In-channel Diversion Law; Memorandum prepared by Legislative Council Staff, June 27, 2005.

Topics to Guide Discussions About RICD Legislation; Memorandum prepared by Legislative Council Staff, August 30, 2005.

Second Regular Session
Sixty-fifth General Assembly
STATE OF COLORADO

Bill A

DRAFT

LLS NO. 06-0221.01 Thomas Morris

SENATE BILL

SENATE SPONSORSHIP

Entz, Fitz-Gerald, Grossman, Isgar, and Taylor

HOUSE SPONSORSHIP

Hodge, Butcher, Curry, Hoppe, and White

Senate Committees

House Committees

A BILL FOR AN ACT

101 CONCERNING THE APPOINTMENT TO THE COLORADO WATER
102 RESOURCES AND POWER DEVELOPMENT AUTHORITY BOARD OF
103 DIRECTORS OF A DIRECTOR WHO IS EXPERIENCED IN WATER
104 QUALITY MATTERS.

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. Specifies that the board

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.

of directors of the Colorado water resources and power development authority shall include one member who is experienced in public health issues related to drinking water or water quality matters. Reduces from 2 to one the number of directorships allocated to persons experienced in the planning and developing of water projects.

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

2 **SECTION 1.** 37-95-104 (2) (b), Colorado Revised Statutes, is
3 amended to read:

4 **37-95-104. Establishment of authority - board of directors -**
5 **removal - organization - compensation - dissolution.**

6 (2) (b) Appointments to the board shall be made so as to include one
7 member who shall be experienced in water project financing, one member
8 who shall be experienced in the engineering aspects of water projects,
9 ~~two members~~ ONE MEMBER who shall be experienced in the planning and
10 developing of water projects, ONE MEMBER WHO SHALL BE EXPERIENCED
11 IN PUBLIC HEALTH ISSUES RELATED TO DRINKING WATER OR WATER
12 QUALITY MATTERS, and one member who shall be experienced in water
13 law. Members of the board shall be representative of the water districts
14 from which they are appointed.

15 **SECTION 2. Applicability.** This act shall apply to appointments
16 to the board of directors of the Colorado water resources and power
17 development authority made on or after the effective date of this act.

18 **SECTION 3. Safety clause.** The general assembly hereby finds,
19 determines, and declares that this act is necessary for the immediate
20 preservation of the public peace, health, and safety.

DRAFT

Bill A

Colorado Legislative Council Staff
NO FISCAL IMPACT

Drafting Number: LLS 06-0221

Date: December 12, 2005

Prime Sponsor(s): Sen. Entz
Rep. Hodge

Bill Status: Water Resources Review Committee
Fiscal Analyst: Marc Carey (303 866-4102)

TITLE: CONCERNING THE APPOINTMENT TO THE COLORADO WATER RESOURCES AND POWER DEVELOPMENT AUTHORITY BOARD OF DIRECTORS OF A DIRECTOR WHO IS EXPERIENCED IN WATER QUALITY MATTERS.

Summary of Assessment

This bill, recommended by the Water Resources Review Committee, specifies that the Board of Directors of the Colorado Water Resources and Power Development Authority shall include one member who is experienced in public health issues related to drinking water or water quality matters. The bill also reduces the number of Board members allocated to persons experienced in the planning and development of water supply projects from two to one. The bill will become effective upon signature of the Governor.

Although the expertise of members serving on the Board is changed in the bill, the number of members remains the same. Therefore, the bill will not affect state or local revenues or expenditures and is assessed as having no fiscal impact.

Departments Contacted

Colorado Water Resources and Power Development Authority

Second Regular Session
Sixty-fifth General Assembly
STATE OF COLORADO

Bill B

DRAFT

LLS NO. 06-0136.01 Thomas Morris

SENATE BILL

SENATE SPONSORSHIP

Isgar,

HOUSE SPONSORSHIP

Curry,

Senate Committees

House Committees

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.)

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.

DRAFT

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 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 • 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:

1 (I) Whether the adjudication and administration of the recreational
2 in-channel diversion would MATERIALLY impair the ability of Colorado
3 to fully develop and place to consumptive beneficial use its compact
4 entitlements;

5 ~~(II) The appropriate reach of stream required for the intended use;~~

6 ~~(III) Whether there is access for recreational in-channel use;~~

7 (IV) Whether exercise of the recreational in-channel diversion
8 would cause material injury to instream flow water rights appropriated
9 pursuant to subsections (3) and (4) of this section; AND

10 (V) Whether adjudication and administration of the recreational
11 in-channel diversion would promote maximum utilization of waters of the
12 state. ~~as referenced in paragraph (a) of subsection (1) of this section; and~~

13 ~~(VI) Such other factors as may be determined appropriate for~~
14 ~~evaluation of recreational in-channel diversions and set forth in rules~~
15 ~~adopted by the board, after public notice and comment.~~

16 (c) Within ninety days after the filing of statements of opposition,
17 the board shall report its findings to the water court for review pursuant
18 to section 37-92-305 (13). The board may ~~defend such findings through~~
19 ~~participation~~ FULLY PARTICIPATE in the water court proceedings.

20 **SECTION • 37-92-103 (7) and (10.3), Colorado Revised Statutes,**
21 **are amended, and the said 37-92-103 is further amended BY THE**
22 **ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:**

23 **37-92-103. Definitions.** As used in this article, unless the context
24 otherwise requires:

25 (6.3) "CONTROL STRUCTURE" MEANS A STRUCTURE CONSISTING OF
26 DURABLE MAN-MADE OR NATURAL MATERIALS THAT HAS BEEN PLACED
27 WITH THE INTENT TO DIVERT, CAPTURE, POSSESS, AND CONTROL WATER IN

1 ITS NATURAL COURSE FOR A SPECIFIED RECREATIONAL IN-CHANNEL
2 DIVERSION. THE CONTROL STRUCTURE SHALL BE DESIGNED BY A
3 PROFESSIONAL ENGINEER AND CONSTRUCTED SO THAT IT WILL OPERATE
4 EFFICIENTLY AND WITHOUT WASTE TO PRODUCE THE SPECIFIED
5 REASONABLE RECREATION EXPERIENCE. CONCENTRATION OF RIVER FLOW
6 BY A CONTROL STRUCTURE CONSTITUTES CONTROL OF WATER FOR A
7 RECREATIONAL IN-CHANNEL DIVERSION.

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

18 (10.1) "REASONABLE RECREATION EXPERIENCE" MEANS THE USE
19 OF A RECREATIONAL IN-CHANNEL DIVERSION FOR, AND LIMITED TO,
20 KAYAKING. OTHER RECREATIONAL ACTIVITIES MAY OCCUR BUT MAY NOT
21 SERVE AS EVIDENCE OF A REASONABLE RECREATION 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 UNLESS THE APPLICANT CAN DEMONSTRATE
4 THAT THERE WILL BE DEMAND FOR THE REASONABLE RECREATION
5 EXPERIENCE IN ADDITIONAL HOURS OR MONTHS. THERE SHALL BE A
6 PRESUMPTION THAT THERE WILL NOT BE MATERIAL INJURY TO A
7 RECREATIONAL IN-CHANNEL DIVERSION WATER RIGHT FROM SUBSEQUENT
8 APPROPRIATIONS OR CHANGES OF WATER RIGHTS IF THE EFFECT ON THE
9 RECREATIONAL IN-CHANNEL DIVERSION CAUSED BY SUCH APPROPRIATIONS
10 OR CHANGES DOES NOT EXCEED ONE-HALF OF ONE PERCENT OF THE
11 LOWEST DECREED RATE OF FLOW FOR THE RECREATIONAL IN-CHANNEL
12 DIVERSION.

13 SECTION • 37-92-305 (13), Colorado Revised Statutes, is
14 amended to read:

15 **37-92-305. Standards with respect to rulings of the referee and**
16 **decisions of the water judge.** (13) (a) The water court shall apply the
17 ~~factors set forth in section 37-92-102 (6).~~ All CONSIDER THE findings of
18 ~~fact contained in the recommendation of~~ MADE BY the Colorado water
19 conservation board PURSUANT TO SECTION 37-92-102 (6) (b) REGARDING
20 A RECREATIONAL IN-CHANNEL DIVERSION, WHICH FINDINGS shall be
21 presumptive as to such facts, subject to rebuttal by any party. IN
22 ADDITION, THE WATER COURT SHALL CONSIDER EVIDENCE AND MAKE
23 AFFIRMATIVE FINDINGS THAT THE RECREATIONAL IN-CHANNEL DIVERSION
24 WILL:

25 (I) NOT MATERIALLY IMPAIR THE ABILITY OF COLORADO TO FULLY
26 DEVELOP AND PLACE TO CONSUMPTIVE BENEFICIAL USE ITS COMPACT
27 ENTITLEMENTS;

1 (II) PROMOTE MAXIMUM UTILIZATION OF WATERS OF THE STATE;
2 (III) INCLUDE ONLY THAT REACH OF STREAM THAT IS APPROPRIATE
3 AND REQUIRED FOR THE INTENDED USE;

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

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

8 (b) IN DETERMINING WHETHER THE INTENDED RECREATION
9 EXPERIENCE IS REASONABLE AND THE CLAIMED AMOUNT IS THE
10 APPROPRIATE FLOW FOR ANY PERIOD, THE WATER COURT SHALL CONSIDER
11 ALL OF THE FACTORS THAT BEAR ON THE REASONABLENESS OF THE CLAIM,
12 INCLUDING THE FLOW NEEDED TO ACCOMPLISH THE CLAIMED
13 RECREATIONAL USE, BENEFITS TO THE COMMUNITY, THE INTENT OF THE
14 APPROPRIATOR, STREAM SIZE AND CHARACTERISTICS, AND TOTAL
15 STREAMFLOW AVAILABLE AT THE CONTROL STRUCTURES DURING THE
16 PERIOD OR ANY SUBPERIODS FOR WHICH THE APPLICATION IS MADE.

17 (c) IF A WATER COURT DETERMINES THAT A PROPOSED
18 RECREATIONAL IN-CHANNEL DIVERSION WOULD MATERIALLY IMPAIR THE
19 ABILITY OF COLORADO TO FULLY DEVELOP AND PLACE TO CONSUMPTIVE
20 BENEFICIAL USE ITS COMPACT ENTITLEMENTS, THE COURT SHALL DENY
21 THE APPLICATION. THE DECREE SHALL SPECIFY THAT THE STATE ENGINEER
22 SHALL NOT ADMINISTER A CALL FOR A RECREATIONAL IN-CHANNEL
23 DIVERSION UNLESS AT LEAST NINETY PERCENT OF THE DECREED RATE OF
24 FLOW FOR THE APPLICABLE TIME PERIOD IS PRESENT.

25 (d) THE WATER COURT SHALL RETAIN JURISDICTION OVER A
26 RECREATIONAL IN-CHANNEL DIVERSION FOR A MINIMUM PERIOD OF
27 TWENTY YEARS, DURING WHICH TIME IT MAY RECONSIDER ITS DECREE

1 UPON MOTION OF ANY PARTY TO DETERMINE IF RECREATION HAS CEASED,
2 THE CONTROL STRUCTURES HAVE BEEN ALTERED OR REMOVED, THE FLOW
3 AMOUNT DECREED IS NO LONGER NECESSARY, OR SUCH OTHER MATTERS
4 AS IT DEEMS APPROPRIATE.

5 **SECTION • Applicability.** This act shall apply only to
6 applications for and the administration of new recreational in-channel
7 diversions filed on or after the effective date of this act.

8 **SECTION • Safety clause.** The general assembly hereby finds,
9 determines, and declares that this act is necessary for the immediate
10 preservation of the public peace, health, and safety.

DRAFT

Bill B

Colorado Legislative Council Staff
NO FISCAL IMPACT

Drafting Number: LLS 06-0136

Date: December 12, 2005

Prime Sponsor(s): Sen. Isgar
Rep. Curry

Bill Status: Water Resources Review Committee
Fiscal Analyst: Marc Carey (303 866-4102)

TITLE: CONCERNING THE ADJUDICATION OF RECREATIONAL IN-CHANNEL DIVERSIONS.

Summary of Assessment

This bill modifies the requirements applicable to the adjudication of a Recreational In-Channel Diversion (RICD) in a number of ways. First, the bill limits the definition of a RICD by specifying that it is the amount of water diverted or controlled during the daytime hours between April 1 to Labor Day under most conditions. The bill further specifies a presumption of no material injury to the RICD from subsequent appropriations or changes in water rights unless the effect on the RICD is greater than 0.5 percent of the lowest decreed rate for the RICD. The bill also specifies that a "call" on a RICD water right will only be administered if it results in at least 90 percent of the decreed rate of flow for the applicable time period.

The bill defines a "control structure" used for RICDs as a structure consisting of durable materials that has been placed with the intent to divert, capture, possess, and control water in its natural course for a specified RICD. The bill requires the structure be designed by a professional engineer, and be able to efficiently and without waste produce the specified "reasonable recreational experience". The bill defines such an experience as "the use of the RICD for kayaking" and specifies that while other activities may occur, they may not serve as evidence of such an experience.

The bill requires that the water court make specific findings regarding RICD applications and retain jurisdiction for a minimum of 20 years to allow reconsideration of the RICD decree. Finally, the bill alters the role of the Colorado Water Conservation Board (CWCB) plays in the process by:

- repealing the requirement that the CWCB make a recommendation to the water court as to whether the RICD should be granted, granted with conditions, or denied; and
- deleting two required factors and one discretionary factor on which the CWCB is required to make findings of fact.

This bill will become effective upon signature of the Governor, and applies only to applications for and the administration of RICDs filed on or after this date.

Other Information

Department of Natural Resources, Colorado Water Conservation Board. This bill reduces the role of the CWCB by eliminating the requirement that they make a final recommendation to the water court regarding the proposed RICD. The bill also eliminates two required factors and one discretionary factor which the board must consider in developing their written findings of fact on RICD applications. It is anticipated that these changes will not impact the Board's allocation of budgetary resources with regard to RICDs.

Department of Natural Resources, Division of Water Resources. This bill restricts the water that may be used for a RICD to flows occurring in the daylight hours during the months of April through August. Because the Division is unaware of any other types of water rights that involve seasonal or hourly restrictions, it is possible that, depending on the specific nature of the RICD and the upstream junior rights, administration of a RICD call under this bill would involve increased administrative costs. However, the anticipated volume of such cases is not thought to be significant. In addition, because these restrictions apply only prospectively to RICD's and would require a number of junior rights holders, any additional costs would only occur several years into the future.

Judicial Branch. The required 20 year jurisdiction over a RICD may result in additional hearing time if parties repeatedly request reconsideration of a decree granting a RICD. These impacts could take years to materialize since RICD cases are relatively rare and this bill applies only to cases filed on or after the effective date of this legislation. The volume of these hearings in the first two years is anticipated to be low enough to absorb within existing budgetary resources.

Thus, this bill will not impact state or local revenues or expenditures and is therefore assessed as having no fiscal impact.

Departments Contacted

Natural Resources

Judicial