

# **Colorado Trout Unlimited**

## **Resource Library**

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~~CTU is indebted to Larry MacDonnell~~  
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# Basic Water Law Simplified

Jo Evans

*(Note: This is intended as a layperson's guide to some of the basics of Colorado Water law. If you have an actual water issue, hire a water lawyer!)*

## Doctrine of Prior Appropriation

The Doctrine of Prior Appropriation governs surface water in most of the western states where water is scarce. It is very different from the Riparian Doctrine used in the eastern states where water is more plentiful. The standard dictionary definition of appropriate is to “take for one’s own use or to set aside for some special use”. (Webster’s) It means the same thing in water law. The Doctrine of Prior Appropriation allocates water based on use and chronological priority.

Colorado surface water law is a system of administered water rights. There are four fundamental tenets to remember.

- Own the use of the water, not the drops of water (*beneficial use*)
- First in time, first in line (*priority*)
- No injury to existing water rights
- Use it or lose it

## Hypothetical

Sometimes it’s hard to get a real feeling for abstract terms. Try the following hypothetical.

Farmer John wants to take water out of Babbling Brook (“\**diversion*”) and use it on his farm. Back East, John would need to have property bordering the stream. In Colorado, John does not need to own property along the banks of Babbling Brook. He needs the right to use water taken from Babbling Brook. John must file his claim for a water right with a Colorado water court.

*\*A diversion is a physical structure that removes or controls the natural flow of water. Generally a diversion takes water out of a stream. It can also mean to control the water in the stream*

## Use

John must specify how he intends to use the water and how much he reasonably needs to use. (\**Beneficial use*) He must also say when he will use the water. (If John claims water to irrigate cantaloupe, he might have a hard time showing why he needs to pour it on an unplanted, frozen field in January) Since John can not

own the water, he must allow any unused water that runs off his fields to return to Babbling Brook.

*\*Beneficial use means the use of water that is reasonable and appropriate for the purpose for which the appropriation was made. The term refers to both the manner of use and the demonstrated need.*

### Water Court

Other people already have rights to use water from Babbling Brook. John must show that there is unused water available for him to claim. Other water rights owners may step up and say “Hold on, court. There’s not enough water available.” Or “Hey, that’s not really a beneficial use.” John must work it out with the objectors in order to get his right. If the court grants his decree, his right will be final (absolute) when he actually uses the water.

### Priority

John’s right to use the water will be dated. The date that the right is granted is its priority date. The older the right the more senior the right. If there is not enough water for every one on a stream, only the senior rights are filled. (“First in time, first in line.”)

John’s right will be junior to everyone who already had a right when he got his. John’s right will be senior to everyone who gets a right after his is established. John’s water right will be ranked by when he got it, not by where he got it. If someone gets a right later, even if they are above him on the stream, John gets to take his water before the newer upstream right.

### No Injury

John’s priority date will protect his right to use the water. All established water rights, juniors as well as seniors are protected from injury. Suppose Fred, another farmer with an old, old water right decides to stop irrigating crops, build subdivision, make a bunch of money, and retire to Florida. Since Fred’s right is a right to use water according to the terms of his decree, Fred will have to go to water court and ask for a change of use. John may object, even if his right is junior to Fred’s. Fred’s use can not harm (materially injure) John’s use.

### Use it or lose it

To keep his right, John must continue to use the water. If he intentionally does not use the water, he can lose the right to use it.

### Summary

In Colorado a water right is a legal right to use water. (Beneficial use) The water right owner does not own the drops of water. (S)he owns the right to use water for a specific purpose and only for that purpose. Beneficial use is not left to the whim of the person seeking the right. There are identified legal beneficial uses. Beneficial uses include domestic, municipal, agricultural, industrial, recreational and environmental.

In Colorado, a person seeking a water right can not simply get a permit. (S)he must go to a water court. The court verifies that the proposed use is ok and determines the priority. The right will be for only the amount necessary for the use claimed under the terms and conditions specified in the water court decree that establishes the right. Unused water must be allowed to return to the stream (return flow) where it may be used by the next appropriator. The right becomes final when the water is actually used.

Under most circumstances, “use” means to take water out of the stream and do something with it. Under a few specific circumstances water may be beneficially used in the stream channel. For example, a hydroelectric facility may obtain rights to use water in the stream channel to generate electricity. The water is controlled in the stream by structures.

Environmental in stream rights are more limited. Colorado’s Instream Flow Law (ISF) was passed by the legislature in 1973 and has been amended several times. The law establishes that water kept in the stream for environmental protection or improvement is a beneficial use. Instream flow is the only beneficial use that does not require diversion. Only the state itself may hold an instream flow right.

The legislature has recently passed specific laws governing recreational in-channel use (Recreational In-Channel Diversions or RICDs). Only governmental entities may own recreational in-channel rights.

**Post Script**

Did you note there are a few rights missing? Aesthetic preservation is not a beneficial use. A river can not own a water right. The fish in the river can not own a water right. If the legal exercise of water rights dries up the stream, the fish die. What if you wanted to buy water for a stream or for the fish? Sorry. Individuals can not obtain private water rights for the river. If you had a billion dollars to spend and you wanted to purchase water rights to protect your favorite trout stream, you could not do so.

While the law says that water can not be wasted, waste doesn't always mean what we might think. There is an oft told joke of a man staring pensively at a river flowing past his property and saying, "Look at all that unused water just going to waste."

Key terms (see Dictionary of Basic Water Terms):

Appropriation, Water right, Diversion, Beneficial use, Return Flow, Priority, No Injury

## DICTIONARY OF A FEW BASIC WATER TERMS

Jo Evans

- Absolute water right

A final water right, when the water has actually been put to beneficial use. (See "water rights")

- Acre-Foot (af)

The basic measurement of standing water, an acre-foot is the amount of water it would take to cover an acre of land to a depth of 1 foot. It is approximately 325,850 gallons.

- Adjudication

Adjudication is the judicial decree describing a water right and determining its priority date. The older the right the more senior the right. (First in time, first in line) Water rights must be adjudicated in one of Colorado's 7 water courts.

- Appropriation

Appropriation is the right to take water from a stream and put it to beneficial use. Appropriation is the basis of Colorado water law. Appropriative rights are considered property rights and may be bought, sold, leased, and exchanged, just as any other real property may. Appropriation establishes a water right by diversion and application to beneficial use.

- Basin

A river basin is the drainage area of a particular river.

- Beneficial Use

Appropriation of water must be for a beneficial use. Only the amount reasonably needed for a lawful purpose is "beneficial." *Colorado law does not designate all beneficial uses. It says instead "use of that amount of water that is reasonable and appropriate under reasonably efficient practices without waste for which the appropriation was lawfully made" C.R.S. 37-92-103(4)*

Beneficial use refers both to the purpose of the use (irrigation, municipal, etc.) and the manner of the use (demonstrated need for the amount of water appropriated under reasonably efficient practices)

The 1876 Colorado Constitution named only agricultural, municipal, industrial, and domestic uses as beneficial uses. In 1973 the legislature passed a minimum stream flow bill which created a new category of beneficial use. State held instream flows sufficient to protect the environment to a reasonable degree are a beneficial use. In 2002 the law was amended to also permit improvement of the stream as a valid beneficial use.

- Bypass flow

A Bypass Flow is not a water right. It is a federal permit condition that requires the operator of a dam or other water diversion works located on federal lands to allow a portion of the stream to “pass by” the structure. The bypassed water remains in the stream.

- Colorado General Assembly

The actual term for the Colorado legislature.

- Compensatory Storage

Compensatory storage refers to the concept that the impacts of a transbasin diversion may be partially off set (“compensated”) by constructing additional storage within the basin of origin. Green Mountain Reservoir was constructed as compensatory storage on the West Slope for the Colorado Big Thompson project which diverts Colorado River Water to the East Slope.

- Conditional Right

Conditional rights are a way to essentially hold your place in line within the priority system until appropriated water is actually used. A conditional right is a right to use water conditioned upon completion of a specified project within a reasonable amount of time. Maintaining a valid conditional right requires a showing of diligence (periodic proof that you are really going to build something someday). A conditional water right becomes an absolute right when the water is actually used.

- **Conjunctive use**

Joint use of ground and surface water

- **Consumptive Use**

Water that is “consumed” and does not return to the natural stream system from which it was taken for beneficial use.

- **Cubic feet per second (cfs)**

CFS is a measure of the rate of the flow of a cubic foot of water past a specific point. One cfs amounts to a volume of one cubic foot (7.48 gallons) per second. It is equal to 448.8 gallons/minute or 1.984 acre feet/day. One cfs was estimated by NWF to be roughly equivalent to the flow of thirty garden hoses going at the same time.

- **Diversion**

A diversion is a physical structure that removes or controls the natural flow of water. Generally a diversion takes water out of a stream. It can also mean to control the water in the stream. (See RICD)

- **Equitable Apportionment**

When the Supreme Court is called upon to resolve disputes between states over water, it weighs the equities of each state in resolving the dispute. The Supreme Court has ruled that equitable apportionment will not protect waste. A state's commitment to conservation is an integral factor in determining its equitable apportionment of a disputed interstate river.

- **Evapotranspiration**

The combined effect of losing water through evaporation and transpiration by plants. Such water is consumed (“consumptively used”) in the process of irrigation and thus can not be returned to the natural stream.

- **Federal Reserved Water Rights**

When the federal government reserves land for a specific purpose, such as a national forest or a wilderness area, it also reserves sufficient water for the stated purpose of

the reservation.

- Foreign Water

Water transported from a different basin. Foreign water may be used to extinction. (Also called non-native water or imported water)

- Ground Water

Ground water is water under the ground. Legally, there are three kinds of ground water, tributary, non-tributary, and not-non-tributary.

Non-tributary ground water is water deep within the ground that is not connected to surface water. Not-non-tributary is a legislatively created category that applies only in the Denver Basin.

Tributary ground water is water underneath the ground that is physically connected with surface water. Surface water law applies to tributary ground water because what affects tributary ground water also affects surface water.

- Instream flow right (ISF)

A state water right created by the Colorado Legislature. The state itself holds the ISF rights on behalf of the people of Colorado. An ISF is to preserve or (thanks to our efforts in 2002 and SB156) also *enhance* the environment to a reasonable degree. Instream flow is the only beneficial use that does not require a diversion.

- Interstate compacts

Colorado's share of water in the interstate rivers is protected by 9 interstate agreements with other states, which have been ratified by Congress and have the status of federal law.

The compacts entitle Colorado to take a great deal of water from the interstate rivers, provided we can show that we NEED the water. The compacts protect our share, but stipulate that we may only divert the water when we need it. We may not simply hoard the water to prevent downstream states from getting it. "Use it or lose it" does not apply to compacted interstate water allocations.

- **Material Injury**

A measurable negative impact or effect. No proposed change in water use may occur if it would materially injure any other existing water right.

- **Prior Appropriation**

Also known as "first in time, first in right," the prior appropriation doctrine is the fundamental basis of Colorado water law. Water rights are ranked according to chronology, not location. The older the right, the more senior the right. When supplies are limited, senior rights are met. Junior rights may not be met.

- **Priority Date**

Date of the appropriation of a water right.

- **Return Flow**

When water is taken from a natural stream and put to beneficial use, that which is not consumed returns to the stream. It is subject to use by the next appropriator.

- **Riparian**

Area adjacent to a natural water body

- **Riparian Doctrine**

Body of water law common in most Eastern states where the water is plentiful. Water use is tied to ownership of the land adjacent to the water. The use must be reasonable (not defined) and may not interfere with the reasonable use of other riparian users. It is a very different system of water law than that which evolved in Western states where water is scarce.

- **Surface Water**

Surface waters (streams, lakes, ponds, and ground waters directly connected with them) Laws governing the use of surface waters are administered in accordance with the doctrine of prior appropriation.

- **Transbasin diversion**

Removal of water from the drainage area in which it occurs naturally for use in an entirely different basin. The water so removed is totally gone from the basin of origin. Water used in the new basin will return to streams in the new basin. None returns to the stream in the basin from which it was taken.

- **Water Rights**

A water right is a right to use water. Water rights are fully transferable property rights. We do not own the drops of water. We own a specified use of the water.

Absolute water right

Final or perfected water right. When the water has actually been put to beneficial use, the right is absolute. The project is complete.

Conditional Water Right

Conditional rights are essentially a way to hold your place in line within the priority system. A conditional right is a right to use water conditioned upon completion of a specified project within a reasonable amount of time.

Maintaining a valid conditional right requires a showing of diligence (periodic proof that you are really going to build something someday). A conditional water right becomes an absolute right when the water is actually used.

*Note: In answer to a question raised at a recent workshop, an inability to use water because there is not enough for every one and junior rights are not filled does not affect the right. (See priority)*

# **WATER USE IN THE STREAM**

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# WATER USE IN THE STREAM

## COMPARISON CHART

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### Instream flow, In-Channel diversion, Recreational In-Channel diversion (ISF, ICD, RICD)

#### **Instream flow (ISF)**

- A Colorado water right held by the state on behalf of all the people of Colorado.
- Purpose: To preserve or improve the environment to a reasonable degree by allowing specified quantity of water to flow between 2 named points.
- Created by state law in 1973.
- *ISF is the only Colorado water right that does not require diversion.* The water is not controlled by any physical structure.

#### **In-channel diversion (ICD)**

- A Colorado water right to use water without taking it out of the stream channel.
- Purpose: use specified in the decree.
- A hydropower plant would be an example of a diversion where a structure or structures controls a use of water in the stream channel.

#### **Recreational In-channel diversion (RICD)**

- A Colorado water right where a structure controls water in the stream channel
- Purpose: Strictly for recreational use
- Legislature has imposed specific limitations. (Currently a battleground issue)
- Only governments may obtain an RICD

See also **Bypass Flow** (permit condition by federal land manager).

#### *Key terms*

*Water right: a right to use water*

*Diversion: a structure that either takes water out of a stream or controls the flow in the stream for beneficial use.*

## **Colorado Instream flow**

### **A Short Overview**

Jo Evans

An instream flow (ISF) right is a state water right to ensure specific amount of water flows between 2 specified points. It is measured in cubic feet per second (cfs) It has a priority date and is established by the state on behalf of the public. It is to protect the environment to a reasonable degree, and thanks to CTU and SB156 a few years ago, also to improve the stream environment.

Instream flow rights are held by the state itself. As a real and valid state water right, ISF is subject to all the procedures, protections and stipulations of any other Colorado water right. The state may acquire existing decreed rights through purchase or donation and petition the court to change the use to an instream flow right. It may also appropriate unappropriated water in the same manner as anyone else.

Only the state may hold an instream flow right. You and I can not. The state acquires the right on behalf of the people of Colorado. If a subsequent proposed use by another could harm (materially injure) a decreed ISF, the state may object. If the state does not object, a member of the public may intervene to protect the public's right.

ISF is the only beneficial use of water that does not require a diversion.

(See also:

Water Law 101, Comparison chart on instream uses, Colorado's Instream Flow Program, and Water 101)

## Colorado's Instream Flow Program

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Under Colorado surface water law, a water right is the right to use water. We do not own the drops of water, but we own the right to put the water to a beneficial use. Beneficial use is the measure of a water right under Colorado law. Originally only agricultural, municipal industrial and domestic uses were recognized beneficial uses.

In 1972 strong pressure for a constitutional amendment to protect streams caught the attention of the Colorado General Assembly. The grass roots movement, led by Colorado Trout Unlimited, sought to create an environmental water right. CTU sought to create a right to protect the stream itself. Water left in the stream for environmental purposes could be owned, as all other rights were, by anyone who could establish a legal right in accordance with the doctrine of prior appropriation.

The Colorado legislature responded by creating the Instream Flow Program in 1973, which recognizes protection of the environment as beneficial use. On behalf of the people of Colorado, the state of Colorado was authorized to appropriate water in natural streams and lakes sufficient "to protect the environment to a reasonable degree." Unlike the proposed grass roots initiative, under the ISF program enacted by the legislature, only the state can hold instream flow rights. Individuals cannot. The state, however, owns the rights as a fiduciary agent for the people of Colorado. All ISF rights are public rights.

The Colorado Water Conservation Board (CWCB) establishes the right. The public's instream flow rights are full, legal, water rights, decreed in state water court, subject to all the same protections, procedures and requirements as all other water rights. No subsequent change may injure an ISF.

To date the CWCB has appropriated instream flow rights on some 8000 miles of stream and 485 natural lakes.

ISF is central to the mission of CTU. Over the 33 years of the program, There have been modifications of the original statute. Development interests

have launched several attacks on the ISF Program, and each time, CTU has been in the vanguard of the ISF defenders.

In 2003 we succeeded in adding a significant improvement to the existing law with the passage of SB156. Previously, ISE could only be used to protect an existing pristine aquatic environment. ISF could not be used to improve impaired habitat. Subsequent to the CTU legislation, ISF can now also be used to improve a stream.

At the 2003 Rendezvous, CTU awarded high honors to the sponsors of SB156, Senator Ken Gordon and Representative Matt Smith

## **Recreational In-Channel Diversion (RICD)**

Jo Evans

Recreational in-channel diversion (RICD) refers to the use of water in the stream channel where a structure controls the flow of the stream within a designated section in order to provide specific beneficial recreational uses. RICDs are decreed water rights.

There have been a number of court cases since Fort Collins originally sought, and obtained, an in-channel water right for fish ladders and a boat chute in the Poudre River to improve recreational use through the town. In 2001, at the urging of the Colorado Water Conservation Board (CWCB), the legislature enacted a law to put specific limitations on the in-channel use of water for recreational purposes. Under the 2001 law, only governments may obtain the right for a recreational in-channel diversion. The specific recreational use is named. Recreational use means the minimum amount of water necessary for a "reasonable" recreational experience.

Unlike other in-channel uses, the CWCB has a gate keeper role in the review of a proposed recreational in-channel use. After filing an application for a recreational in-channel diversion, the applicant must go to the CWCB. The Board makes a number of evaluations of the proposed use, makes its recommendations to the court, and may defend its opinions in the court proceedings.

The issue remains a legislative battleground.

## **Bypass Flow**

### A bypass flow is a federal permit condition

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Bypass flows are not water rights. They are conditions on the use of public land. Courts have upheld that the federal government has the authority to impose conditions on the use of federal lands, even if the conditions affect the exercise of a state water right.

A special use permit is required in order to operate a dam or diversion works on federal land. Under Federal law, land agencies must minimize damage to fish, wildlife and the environment. In some cases, the federal land manager may impose a bypass flow requirement on the permit. Under low flow stream conditions, the operators may be required to close their head gates or to otherwise release water, allowing the water to bypass the diversion structure and simply remain in the stream. Unlike a state water right for an instream flow, a bypass flow is not a specified flow between 2 discrete points.

In a way imposition of a bypass flow requirement is comparable to a landlord placing requirements on your apartment lease. You occupy the apartment, but you do not own it, and there are sets of requirements with which you must comply for the period of the lease. If you seek to renew the lease, there may be different requirements. Times have changed. The rent may be higher. If you do not want to pay the increased rent, you do not have to renew the lease, even if you fixed the screen door and painted the living room.

Owners of dams and diversions can be “tenants” on public lands, but like any tenant they are expected to ensure that their operations do not harm the underlying property. In this case, that means they must operate consistent with long term conservation of the public lands belonging to their landlord, the people of the United States.

A Bypass Flow requirement means that under certain conditions, a federal land manager may direct the operator of a dam or diversion works located on federal lands to allow a portion of the stream to “pass by.” The bypassed water remains in the stream.

## **IMPACTS OF OUT OF BASIN TRANSFERS**

**CTU Presentation to Grand Junction Public Water Forum**

**2005**

**Jo Evans**

Colorado currently transfers a great deal of water from one river basin to another. It is thus not surprising that between 1988 and 2002 the Colorado General Assembly looked at 18 "basin of origin" proposals. Some were compensation/mitigation approaches; some focused on additional requirements before diversion, and some required voter authorization in the sending areas. Some applied to transfers from one basin to another. Others applied to transfers across jurisdictional boundaries.

The concerns that prompted bringing these proposals forward are easily identified. Water does more than keep fish wet. It is the building block of the entire riparian ecosystem and the lifeblood of local economies. When water is used within its natural basin, most eventually returns and is used again and again. When water is taken out of its basin it is simply gone. There is no return flow either to the streams or recharge to the ground waters. Moreover often it is taken at the top of the system. This, of course, severely impacts quality and flow regimes for the rest of the stream's course.

Less water in a stream changes the stream. Assimilative capacity is reduced. The flow is altered. The temperature may change. Sedimentation patterns alter. Water quality is affected. Fish and wildlife habitats are influenced. The change in river habitat can be dramatic. Riparian ecosystems are fragile. Changes in the canopy cover over a stream due to the loss of phreatophytes can actually alter the microclimate. Temperature increases can eliminate a stream as a trout fishery.

Out of basin transfers have broad socioeconomic consequences as well. Quality and quantity of streams affect both recreational opportunities and a clearly dependent tourism industry. Agriculture may be deeply and adversely affected. Municipal dischargers may face prohibitively expensive treatment costs due to the reduction of assimilative capacity. Sometimes a community's ability to continue to defray general obligation bonds on schools and local infrastructure is imperiled. Quite simply, out of basin transfers have the potential to affect life style, economy, ecology, and the capacity for continued growth in the area of origin.

Out of basin transfers are unique in their implications for the sending basin. Normally, the "no harm" rule protects other appropriators in change cases. However, since the "no harm" rule under the appropriation doctrine does not consider harm to the ecology, economy, lifestyle, and potential future growth, many other western states provide some form of statutory oversight to protect the basin of origin from the lasting and potentially severe impacts of out of basin transfers.

- Some states (Mt, Tx, Okla, New Mex for example) set aside a portion of water for the exclusive use for the basin of origin or only allow the transport if it is surplus to reasonable needs in basin for some specified period of time.
- Some, like Az, give quasi or virtual veto power to the originating basin
- Some, like Neb, have a public interest test and or specific state oversight and conditions
- Some actually allow a right of recapture

While other states have enacted measures to address economic, environmental, and societal consequences inherent in out of basin transfers, here in Colorado we have only the Conservancy District Act. It is limited both in scope and applicability. It applies only to protection of water rights, not the ecological and social impacts we were just discussing and applies only to projects constructed by water conservancy districts, not cities or other water developers.

Ultimately I suggest there are 4 basic components that need to be addressed with respect to basin of origin issues.

1. The full range of both ecological and economic impacts must be adequately addressed before any out of basin transfers proceed.
2. Anyone seeking to divert out of basin must enter into some sort of process that leaves the sending basin whole.
3. The receiving basin ought to have first instituted all reasonable efficiency measures.
4. The process by which out of basin transfers are agreed upon is open and comprehensive with all affected parties at the decision table.

**These conditions must be real and enforceable components of the final decision**

To translate these principles into legislation requires a few basic rules.

- To prevail it is imperative to know specifically what problem you're trying to solve.

Focus on the damage you are trying to prevent Listen carefully: Folks may be trying to solve entirely different problems. If your problem is that we don't have enough dams, compensatory storage may have merit. If the problem is attempting, where possible, to maintain free flowing streams and the ecology and economies they support, compensatory storage is not a very good answer. To me that's the 2 wrongs make a right doctrine. If you harm a stream by taking out one bucket of water, you're not helping it if you take out 2. It's a lot like ordering 100 bottles of aspirin because you need cotton balls.

- In seeking solutions ask the right question or you may wind up like the girl's father who said to the young man, "If you can add 6 and 4, you may marry my daughter." Thinking fast, the young man replied "11."

- Be sure that the answer you get is really to the question you asked. Recently we've seen legislation that only addresses absolute rights, not conditional water rights. What's the difference? All water rights in Colorado are rights to use water. Conditional rights are rights you are going to use. Absolute rights are rights you have used. The project is built. Conditional rights become absolute when they are perfected by diversion to beneficial use

- And finally, the people trying to solve the problem need to be really trying to solve the problem, not just there to make sure that their ox isn't gored.

One thing is certain. We must seek cooperative problem resolution. We can't be looking for winners and losers because as we grow, we are best served if we grow as a state, sacrificing no region's tomorrows for another region's today's.