

DEPARTMENT OF NATURAL RESOURCES

Colorado Water Conservation Board

2 CCR 408-3

RECREATIONAL IN-CHANNEL DIVERSION RULES

1. Title

Rules Concerning Recreational In-Channel Diversions, adopted pursuant to section 37-92-102, C.R.S., and hereinafter referred to as the “RICD Rules” or “Rules”.

2. Purpose of Rules

The purpose of these Rules is to set forth the procedures to be followed by: 1) applicants for Recreational In-Channel Diversions (hereinafter referred to as “RICDs”); and 2) the Colorado Water Conservation Board (hereinafter referred to as “CWCB” or “Board”) when making Findings of Fact to a water court regarding RICDs. In addition, the purpose of these Rules is to provide guidance about the type of information that will assist the Board in making its findings to the water court. The Board has incorporated into these Rules, the Statement of Basis and Purpose prepared and adopted at the time of the rulemaking. These Rules will supersede the RICD Rules adopted on November 15, 2005, codified at 2 CCR 408-3, and they are intended to apply to applications that will be reviewed by the Board after the effective date of these Rules. However, they will not apply to applications that were already filed prior to July 1, 2006.

3. Statutory Authority

The General Assembly specifically recognized the appropriation and adjudication of RICDs by local governmental entities, pursuant to sections 37-92-102, 37-92-103, & 37-92-305, C.R.S. The statutory authority for these Rules is found at section 37-60-106(k) and 37-60-108, C.R.S. By promulgating these Rules, the Board assumes no liability related to RICDs and expressly does not waive its sovereign immunity under Article 10, Title 24, C.R.S.

4. Definitions

- a. Applicant. Means a local governmental entity that has filed a water court application for a RICD on or after July 1, 2006.
- b. Application Receipt Date. Means the date that the Board receives a copy of the RICD application.
- c. Application. A water court application filed with the CWCB for consideration under these Rules.
- d. Beneficial Use. Is defined as stated in section 37-92-103(4), C.R.S., which is incorporated herein by reference.
- e. Board. Means the Colorado Water Conservation Board as defined in sections 37-60-101, 103 and 104, C.R.S., which is incorporated herein by reference.
- f. Board’s Office. Means the Colorado Water Conservation Board’s office, located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board’s website is <http://www.cwcb.state.co.us>.

- g. Compact Entitlements. Means all of Colorado’s water entitlements pursuant to interstate compacts, equitable apportionments, supreme court rulings designating water apportionments, or any other legally recognized designation of apportionment of interstate waters.
- h. Control Structure. Is defined as stated in section 37-92-103(6.3), C.R.S., which is incorporated herein by reference.
- i. Director. Means the director of the Colorado Water Conservation Board, who is the chief administrative head of the Board, under the direction and supervision of the Board, and who has general supervision and control of all its activities, functions, and employees.
- j. Diversion or Divert. Is defined as stated in section 37-92-103(7), C.R.S., which is incorporated herein by reference.
- k. Findings of Fact. Means the written factual findings of the Board regarding the factors set out in section 37-92-102(6), C.R.S. and filed with the water court.
- l. Instream Flow (hereinafter referred to as “ISF”). Means any water, water rights or interests in water appropriated or acquired by the Board, pursuant to section 37-92-102(3), C.R.S., for the preservation of the natural environment to a reasonable degree. Pursuant to section 37-92-102(3), C.R.S., no other person or entity may appropriate such rights, for any purpose whatsoever.
- m. Local Governmental Entity. Means a Colorado entity authorized to appropriate a RICD and includes a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district.
- n. Person. Means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States, or any other legal entity, public or private.
- o. Reasonable Recreation Experience. Is defined as stated in section 37-92-103(10.1), C.R.S., which is incorporated herein by reference.
- p. Recreational In-Channel Diversion. Is defined as stated in section 37-92-103(10.3), C.R.S., which is incorporated herein by reference.
- q. Staff. Means the Director and other personnel employed by the Board.

5. Optional Pre-Application Process

Prior to submitting an application to the water court or to the Board, the Board encourages the applicant to meet with staff to discuss the proposed RICD application and the procedures to be followed by the Board to review the application. Staff will provide input regarding how the proposed application can meet the intent of the RICD Rules.

6. Submissions Required from an Applicant

Within 30 days after filing an application for a RICD with any water court, an applicant shall submit a copy of the application to the Board office, pursuant to section 37-92-102(5), C.R.S.

7. Required Findings

The Board, after deliberation in a public meeting, is required to make certain written findings relative to each RICD application. § 37-92-102(6), C.R.S. The statutory definition of RICD requires that the applicant claim only the minimum stream flow, that the flow be used for a reasonable recreation experience in and on the water, and that the flow be diverted, captured, controlled, and placed to beneficial use. The required findings on factors are:

- a. Whether the adjudication and administration of the RICD would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements. The Board, in making this finding, may consider, but is not limited to, the following:
 - i. The amount and location of remaining unappropriated compact entitlement waters in the basin in question and at the RICD point of diversion;
 - ii. The proximity of the RICD to the state line;
 - iii. The proximity of the RICD to suitable upstream points of diversion or storage which may be utilized by those who would place the water to consumptive beneficial use;
 - iv. The existence of suitable downstream points of diversion or storage for consumptive beneficial uses before the water leaves the state;
 - v. Exchange opportunities within the state that may be adversely impacted by the existence of the RICD;
 - vi. Whether the basin is over-appropriated;
 - vii. The effect on other decreed, existing undecreed, or reasonably foreseeable uses of the amount of water claimed;
 - viii. Whether a RICD shields waters from a consumptive use that would otherwise be available under a particular compact;
 - ix. Whether beneficial consumptive water use opportunities upstream from the claimed RICD would further develop Colorado's compact entitlements and would be impaired by applicant's sought for stream flow amounts; and,
 - x. What provisions in the application are proposed for reducing or canceling the RICD.

- b. Whether the exercise of the RICD would cause material injury to existing ISF water rights. The Board, in making this finding, may consider, but is not limited to, the following:
 - i. The nature and extent of the ISF in the proposed reach or any affected downstream reach;
 - ii. The timing and duration of the RICD as such may relate to the specific natural environment for which the ISF was decreed;
 - iii. Whether the RICD, or administration of the RICD, would negatively impact the natural environment for which the ISF was decreed; and,
 - iv. Whether during the construction of the RICD structures, the construction may cause material injury to the ISF or the natural environment for which the ISF was decreed.

- c. Whether the adjudication and administration of the RICD, in the amounts claimed, would promote maximum utilization of the waters of the State. The Board, in making this finding, may consider, but is not limited to, the following:
 - i. Whether there are any probable future upstream junior appropriations for direct diversion or storage;
 - ii. Whether there are any probable future changes, transfers, or exchanges of water rights from points of diversion downstream of the reach affected by the RICD to points upstream of or in the reach affected by the RICD;

- iii. Whether Applicant has demonstrated that it has complied with appropriate federal policies, regulations and laws, or has indicated that it will comply with all appropriate federal policies, regulations and laws;
- iv. Whether a reasonable and efficient means is to be utilized to use, divert, capture and control the water for a RICD so as to minimize its call upon the river and avoid waste;
- v. Whether a reasonable demand exists for the recreational activity in question as determined by levels of current use and/or estimates of future use;
- vi. Whether the application has appropriate limitations upon the time of day, days per month, or seasons during which the RICD would be exercised;
- vii. The depth and flow rate of the proposed RICD;
- viii. With what frequency and duration, and from what sources, the requested amounts of water for the RICD occur;
- ix. The economic effects of the proposed RICD;
- x. The environmental effects of the proposed RICD;
- xi. The relationship of the requested RICD flow rates to the historic appropriated and unappropriated flow rates for each time period requested;
- xii. The effect of the RICD on other potential uses of water;
- xiii. Whether the application as a whole meets the elements of the definition of a RICD, as found in section 37-92-103(10.3);
- xiv. Whether the RICD would conserve and efficiently use the available stream flow, thereby promoting maximum utilization of Colorado's water resources;
- xv. Whether the RICD will make the river basin water critical and the resulting impact on existing water rights and users;
- xvi. Whether the RICD may work together with existing and/or future uses within the State of Colorado to promote maximum utilization;
- xvii. Any provision in the application for reducing or canceling the RICD;
- xviii. A description of each recreational opportunity sought by the applicant at each flow amount sought, and why the flow amount is the minimum amount for each reasonable recreation experience sought;
- xix. The historic frequency and flow rates of imported water and reservoir releases through the proposed RICD reach, and whether such flows will be necessary to meet the flow rates claimed for the proposed RICD; and,
- xx. Whether, and to what extent, unappropriated native flows exist in the proposed RICD stream reach during the periods claimed, and the percentage of unappropriated flows claimed by the RICD.

8. Additional Information

Because section 37-92-102(6)(b), C.R.S. requires the Board to report its findings within 90 days after the closing date for the filing of statements of opposition, an applicant may elect to provide additional information at the time it submits its application to the Board. The following types of information would assist the Board in making its findings:

- a. A description of structures, including design plans for the physical control structures, engineering data and calculations used to design the facilities associated with the application;
- b. Maps showing the location of all physical control structures and access points;

- c. Evidence, including hydraulic and hydrologic calculations, that the physical control structures are capable of diverting, capturing, and controlling water within the stream channel;
- d. Documentation describing and justifying the nature of the recreational experience sought;
- e. Documentation identifying and/or justifying the time of day and season of use sought;
- f. Evidence that the amounts requested in the RICD application are available for appropriation;
- g. Information about the frequency of occurrence of the requested stream flows, including exceedance calculations and duration curves for the claimed stream flows;
- h. Information demonstrating that the amount of water claimed is the minimum amount necessary to achieve the reasonable recreation experience sought;
- i. Information about all necessary permits and the status thereof, including existing or proposed permit terms and conditions;
- j. List of persons notified by the applicant about the RICD; and,
- k. Information about existing or proposed gages on the affected stream that may be utilized to administer the water right being sought.

9. Notice

Within fifteen days of the application receipt date, the staff shall post notice of receipt of the application on the CWCB website. The notice shall include the name of the applicant, the flow amounts claimed, the water division, the name of the stream, the proposed reach of the stream, the location of the structures including the county, and information about how to obtain party status. In addition, the staff shall notify the county commissioners of the county in which the RICD is (or will be) located, and any upstream counties. The Board shall include notice of public deliberations on an RICD on its agenda for a regularly scheduled or specially scheduled Board meeting that is also posted on the CWCB website. At that time or at a subsequently noticed Board meeting the Board will: 1) ratify the Statement of Opposition filed by the Staff; 2) direct the Staff to issue appropriate written findings.

10. Statements of Opposition and Staff Report

The staff intends to file a statement of opposition in every RICD case to assure that the Board has the ability to properly weigh in on the requisite factors to the water court. Circumstances may occur where the Staff would propose not filing a statement of opposition to an RICD case, but the Staff would inform the Board of such a case and obtain Board concurrence or comment in these types of situations. The Staff shall provide a written report and recommendation to the Board based on the information provided by the applicant and any other applicable information. At a Board meeting following the Staff's filing of a statement of opposition, the Board will: 1) ratify the statement of opposition, inform the Staff about the appropriate findings to file with the water court, and direct the Staff to fully participate in the water court proceedings; 2) inform the Staff about the appropriate findings to file with the water court and choose to withdraw the statement of opposition; or 3) ratify the statement of opposition and table the discussion regarding the appropriate findings to file with the water court and whether to participate fully in water court.

11. Public Deliberations

The Board will publicly deliberate about the findings that it will make for each RICD.

12. Submission of Findings to the water court

Pursuant to section 37-92-102(6)(c), C.R.S., the Board shall submit its findings of fact to the water court within 90 days after the final closing date for filing statements of opposition.

However, the Board, for good cause shown on the record, may request that the water court grant additional time to the Board for making and reporting its findings of fact.