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## HB 17-1219, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)

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**HB 17-1219, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)** (concerning a pilot program to temporarily lease agricultural water rights by fallowing irrigated land for use by municipalities, other agriculture, environmental purposes, industry, or recreational interests).

House Bill 17-1219 (“HB 1219”) came before the 2017 Regular Session of the General Assembly to extend the number of pilot projects and the timeline established by House Bill 13-1248. This 2013 bill was enacted to meet the Colorado Water Plan’s goal of securing 50,000 acre feet in Alternative Transfer Methods (“ATMs”) in a way that provides certainty for agricultural water rights holders while allowing flexibility in water uses.

HB 13-1248, passed in May of 2013, created a pilot program controlled by the Colorado Water Conservation Board (“CWCB”) to establish up to ten lease-fallow pilot projects temporarily transferring agricultural water rights to municipal water users for up to ten years. A maximum of three of these pilot projects could be in each of the four major river basins—the South Platte, Arkansas, Rio Grande, and Colorado river basins. Those wishing to sponsor a pilot project must also pay a \$500 application fee to CWCB, spaced out over five years, alongside annual participation fees.

The CWCB produced criterion and procedures for the Lease-Fallowing Tool. Lease-fallowing is a voluntary ATM tool which allows several agricultural water rights holders to lease a portion of their water and dry-up a part of their land on a rotational basis. By leasing, rather than selling their water right, farmers retain ownership of their water right and can rest a portion of their land to improve soil quality or make improvements. In 2015, Senate Bill 198 expanded HB 12-1248 to allow for other end uses, such as other agricultural uses or environmental and recreational uses. The application deadline was set for December 31, 2018, and the pilot program was scheduled for completion by 2029. At the end of pilot, the CWCB and state engineer would issue a report on the results to the water resources review committee. As of July 2017, only one pilot project, the Catlin Project in the Arkansas river basin, had been approved.

Representative Jeni Arndt (Democrat, Assistant Majority Caucus Chair, District 53) and Representative Barbara McLachlan (Democrat, District 59) co-sponsored the bill and introduced it in the House Committee on Agriculture, Livestock, and Natural Resources on March 20, 2017. When it reached the Senate, the bill received bipartisan support from Senator Kerry Donovan (Democrat, District 5) and Senator Larry W. Crowder (Republican, District 35). The Senators presented HB 1219 in the Senate Committee on Agriculture, Natural Resources, and Energy on April 6, 2017, where it passed unanimously without amendments. Governor Hickenlooper signed the bill into law on May 3, 2017, and it took effect on August 9, 2017.

The bill extended the Lease-Fallow pilot program by authorizing the CWCB in conjunction with the state engineer to approve as many as fifteen pilot projects, with no more than five projects in any of the four major river basins listed above. The bill extended the deadline for applications from 2018 to December 31, 2023, requiring any projects to finish by 2034. The goal of HB 13-1248, and by extension, HB 1219, was to make it easier for agricultural water rights holders to realize value from their water rights when fallowing their

land, and to preserve their historical consumptive use. The Lease-Fallow Program was intended to be an alternative to "buy-and-dry," where municipalities purchase agricultural water rights permanently. This voluntary pilot program is flexible by design, acknowledging that Colorado is a local control state with differing factual scenarios and circumstances in every water basin.

Even though the deadline of HB 13-1248 was still another year out, the sponsors of HB 1219 reasoned that this is necessary because while only one project is currently underway, the time it took to establish the project, get approval, and get it off the ground was considerably lengthier than originally supposed. They felt that many agricultural producers would not want to go through such a great effort in such a brief duration. Additionally, because this program was untested, many producers and end users alike took a "wait-and-see" approach to the program, carefully watching how the Catlin Project worked out. Further, the expansion of end uses created by SB 198 was only introduced two years ago, which did not give new end users much time to explore utilizing the Lease-Fallow Program. The success of the Catlin Project over the past two years, along with the expansion of potential end uses, has increased interest in participating in the Lease-Fallow Program, and the sponsors of HB 1219 felt that extending the deadlines and number of allowed projects could generate more projects.

HB 1219 received support from many stakeholders, including the Lower Arkansas Valley Water Conservancy District, area farmers, current participants in the Catlin Pilot Project, the Colorado Farm Bureau, the Colorado Water Congress, the Nature Conservancy, and the Colorado Audubon Society. Supporters understood that farmers, who own eighty-six percent of Colorado's water, are being targeted by growing municipalities to meet increasing water demands. Cities, however, do not want to continue to buy-and-dry agricultural water rights, and are willing to pay farmers \$500 an acre foot to lease water available from those farmers fallowing portions of their land. One supporter noted that while cities could buy the same water outright for \$2,000, they want to preserve farming in Colorado. This trend towards leasing is likely to gain momentum as more cities recognize that it is politically incorrect to "buy-and-dry" farmland.

Advocates of the bill pointed out that while there have been other unsuccessful attempts at lease-fallowing, those programs put the municipalities in control. This program, however, keeps the water firmly in the control of the farmers. Doing so helps protect local agricultural economies, and the money farmers receive from lease-fallowing can be used to improve their land and ditches, and to purchase machinery for new methods of irrigation implementation. Essentially, lease-fallowing can be seen as another crop for farmers. The Lease-Fallow Program simply provides farmers with a new option for realizing value from their water rights. It also protects downstream water rights owners from injury and assists farmers by providing flexibility in ways they can use their water.

There was concern expressed by a handful of people in the House and Senate Committees about extending a pilot program that had yet to run its course and had only generated a single pilot project. There was also concern about the "first-come-first-serve" application process unduly favoring older, more established water rights holders.

In response to those concerns, farmers currently involved with the Catlin Project testified that when HB 13-1248 was passed, they thought there would be sufficient time to get the project approved and underway, but they were met with considerable opposition. This opposition required additional engineering and legal work to address the issues brought up regarding the project. Two additional municipalities have expressed interest for other projects, but it takes time to get through all the necessary engineering and paperwork. If the deadline had not been extended, those projects would be unlikely to get final approval before the 2018 application deadline.

The Lease-Fallowing Program protects agricultural communities. As Colorado cities continue to grow, they will meet their water demands by buying water rights unless an alternative, like the Lease-Fallowing Program, is available.

Leasing the water, rather than selling it, allows farmers to maintain ownership of their water. By treating the lease as a crop on the fallowed land, the farmer continues to make money, and the fallowed land requires less input (such as fertilizer) both during the fallowing and into the future. One farmer testified that Lease-Fallowing is a “win-win situation.”

The success of the Catlin Pilot Project over the past two years has created increased interest from those who would like to become involved in a Lease-Fallow project. However, due to the lengthy approval and negotiation process, more time and space was required. The passage of HB 1219 allowed that additional time and space. Cities recognize the value of agriculture and want to establish a cooperative relationship that benefits farmers while still obtaining the water these growing municipalities require. HB 1219 did not change the permissive nature of the Lease-Fallowing Pilot Program, but merely granted more time and space for this creative approach to produce results.

*Alexandra Tressler*

**HB 17-1190, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)** (concerning the limited applicability of the Colorado Supreme Court decision in *St. Jude’s Co. v. Roaring Fork Club, LLC*, 351 P.3d 442 (Colo. 2015)).

House Bill 17-1190 (“HB 1190”) came before the First Regular Session of the Seventy-First Colorado General Assembly as a bipartisan effort to clarify lingering uncertainty regarding the validity of water decrees for aesthetic, recreational, or piscatorial purposes in effect before the Colorado Supreme Court announced its decision in *St. Jude’s Co. v. Roaring Fork Club* in 2015.

In *St. Jude’s*, the Court held that the Roaring Fork Club’s diversion of water for aesthetic, recreational, and piscatorial uses did not qualify as “beneficial uses” under Colorado water law. Consequently, the legitimacy of hundreds of previously decreed water rights for recreational, aesthetic, or piscatorial purposes were brought into question.

HB 1190 was proposed to answer this question. Although the bill went through several iterations before passage, it was generally hailed as a consensus effort, even including the perspectives of both the prevailing and the losing attorneys from the *St. Jude’s* decision. The bill’s sponsors asserted that it was designed to protect decreed water rights in Colorado by limiting the Court’s interpretation of “beneficial use” to only apply to decrees made after the court