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HB 17-1190, 71st Geb, Assemb., 1st Reg. Sess. (Colo. 2017)

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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

announced its decision in *St. Jude's*, and thus protecting decrees that were already established before that decision. In doing so, the bill does not create any new rights or alter the Court's ruling in *St. Jude's*. It merely declares that all recreational water rights decreed before the *St. Jude's* ruling are valid and may be relied upon. This allows water users to proceed with the clarity and the certainty that they will not lose their already existing water rights.

Representative KC Becker (Democrat, Majority Leader, District 13) initially sponsored the bill when she introduced it into the House Committee on Agriculture, Livestock and Natural Resources in March of 2017. When the bill made its way into the Senate it had bipartisan sponsorship from Senator Jerry Sonnenberg (Republican, President Pro Tempore, District 1). Both the House and the Senate passed the bill and Governor Hickenlooper signed it into law on May 25, 2017.

The final bill looks significantly different than it did upon introduction. Its first draft contained three subsections. Subsection (a)—essentially what remains of the bill—addressed those recreational uses which were already decreed, or for which a claim was pending, prior to the Court's ruling in *St. Jude's*. Subsection (b) announced that the bill applied to direct-flow appropriations, without storage, made after July 15, 2015 for "water diverted from a surface stream into a private ditch on private property for aesthetic, recreational, and piscatorial purposes." Subsection (c) declared that nothing in the bill was intended to affect existing statutory authority regarding in-stream flow water rights and recreational in-channel diversion rights. On second reading in the House, subsection (c) was amended to state that nothing in the bill was intended to create any new water rights, and a fourth subsection, (d), was added to declare the bill was not intended to affect existing statutory authority for appropriation of water rights for parks and wildlife purposes.

The bill's supporters stated that subsections (b) through (d) were intended to allay any suspicions that the bill had nefarious purposes, or that it was trying to expand or create new water rights in Colorado. Eventually, these subsections were removed, with the Senate amendments favoring a much more simplistic bill. Opposing committee members and groups expressed great concern over the wording in subsection (b), noting that the bill may be construed to only apply to "water diverted . . . into a private ditch on private property." A representative for the Water Rights Association of the South Platte, a group that primarily represents irrigation districts along the South Platte, expressed concern about the "unintended consequences" of this language because by specifically addressing private ditches on private property, it appeared to create new rights for public entities. The representative said this language could potentially allow new water rights with aesthetic, recreational, and piscatorial uses for certain municipal or other public entities. Despite the following subsection (c) stating the bill did not create any new water rights for beneficial uses for private or public entities, the Association (and others opposing the bill) found this language deeply troubling.

The Senate removed this "ambiguous language" and made a few other changes, which also limited subsection (a). These amendments removed language that sheltered "pending applications" from the *St. Jude's* ruling. The Senate removed this wording, as both supporters and those opposing the bill agreed that the purpose of paragraph (a) was to protect *decreed* water rights,

and pending applications that had not been previously adjudicated by the water court should therefore not receive the same protection as existing decreed water rights.

After these changes, what remained of the bill was (what was originally) subsection (a). It provided a clear legislative assurance of the validity and preservation of those previously decreed existing water rights that were for aesthetic, recreational, and piscatorial uses. The final bill also protects conditional water rights—rights that have been filed with and decreed by the water court prior to actual use while securing an earlier priority. This bill ensures that owners of conditional water rights for aesthetic, recreational, and piscatorial uses will not face objections based on the *St. Jude's* ruling when they return to the water court for diligence or perfection.

The final bill was designed to preclude an overly broad application of the *St. Jude's Co.* ruling and to protect recognized rights. While the parties involved did not agree on everything—as reflected in the multiple amendments—in the end, HB 1190 was a bipartisan consensus effort to address an area of law that had been left unsettled by the Court's *St. Jude's* ruling.

Megan McCulloch

H.B. 17-1291, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (allowing water users to store water in a place of storage not listed on the decree if the historical consumptive use of the water right has been quantified in a previous change).

House Bill 17-1291 ("HB 1291") has also been called the "Another Reservoir on the Ditch" bill. Co-sponsored by House Representatives J. Arndt (Democrat, Assistant Majority Caucus Chair, District 53), J. Becker (Republican, District 65), and Senator D. Coram (Republican, District 6), the bill was introduced to the House on March 24, 2017, and signed into law by Governor Hickenlooper on June 5, 2017. Without any lobbyists or other organizations involved in its preparation, the bill was recognized by legislators and the public alike as a "common-sense" piece of legislation. The bill allows water users to store previously quantified water in an alternate place of storage not listed on their decree without going through water court in certain circumstances.

The benefits of HB 1291 are only available to water users who want to store their decreed water in alternate storage on the same ditch or diversion system (including in nontributary aquifers). The water that qualifies under the bill is limited. It must be attributable to a water right that: (i) has gone through a judicially approved change; (ii) has been decreed for storage; and (iii) has a quantified historical consumptive use. Additionally, the water must be diverted at a point of diversion already decreed for that water right—it cannot be imported from another division—and any applicable transit and ditch losses must be assessed against the water right.

This alternate place of storage is approved administratively, but if someone claims injury, the process returns to water court. The water user must notify the division engineer of the water right, the alternate place of storage, the decreed point of diversion, and the accounting of the storage in the alternative place of storage. The division engineer must then approve the change. Other than the changed place of storage, all other terms and conditions of the previous