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H.B. 17-1291, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)

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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. Assem., 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

water right decree apply to the water right. If any person who is entitled to claim injury from the changed place of storage does so, the application will be brought in water court for a *de novo* hearing, thus preserving the rights of other users along the ditch or diversion system while otherwise streamlining the change process.

The bill grew from a recognition that applying for new storage rights on decreed water within the same ditch or diversion system is unnecessarily costly, rigid, and risky for water users. The ability to store water is essential for water users to control augmentation, recharge, and application. Before the bill's passage, the law allowed water "to be stored only at a location specifically identified in a decree" and required people to make a change to their water right in water court. Yet many users could not independently develop storage because of the associated water court costs. Users who could not afford water court could either depend on auxiliary storage provided by other entities or not always fully utilize their decree. Users such as the Arkansas Groundwater Users Association ("AGUA") depended on space in existing reservoirs for year-to-year storage, running the risk that their water would simply run downstream when flows exceeded storage capacity.

During the legislative process, Chris Treese of the Colorado River Water Conservation District ("CRWCD") and others recognized HB 1291 as "that mythical, short, two-page, common-sense water bill that deserves support," and accordingly, it was passed without any "No" votes. In the House Committee on Agriculture, Livestock, & Natural Resources hearing, witnesses supporting the bill represented the City of Fort Collins, AGUA, the CRWCD, and various other organizations. The original bill text lacked the specific language that preserved the rights of injured users, limited the water to the same ditch or diversion system and water division, and specified that all other terms and conditions remained the same. Those shortcomings were addressed by amendment L.001 which clarified that the new or changed reservoir is along the same ditch or diversion system, preserved due process for water users claiming injury, and prevented the bill from being used for water imported from another division. Trout Unlimited, a conservation organization, supported the amendment and proposed additional language to assure that all other terms and conditions other than the change in storage continue to apply. The House adopted this language on Second Reading through amendment L.005.

In addition to making the lives of Colorado water users easier, HB 1291 also has some potential to help Colorado reach its water storage capacity goals as outlined in the Colorado Water Plan. The Water Plan aims to develop 400,000 acre-feet of storage by 2050. While the future storage that will be developed through HB 1291 will likely be relatively small, it will contribute to Colorado's ongoing commitment to develop more water storage statewide. This additional storage in traditional reservoirs and nontributary aquifers will help water users and managers be more flexible and adaptable as the changing climate alters snowmelt regimes, flooding, and drought.

HB 1291 will have a niche impact specific to water users who change or add storage to their decree along the same ditch without injuring other users. The bill offers those users long-term, reliable water storage security that will enable them to fully utilize their decreed right through application, recharge, and augmentation—no longer must they allow water that lacks adequate storage

to just run downstream. By streamlining the process of developing or changing storage opportunities while protecting other users from injury, HB 1291 is a small, simple bill with real benefits for Colorado's water users.

Julia Bowman

S.B. 17-117, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (confirming that a water right decreed for agricultural use can be used to cultivate industrial hemp).

Colorado Senate Bill 17-177 ("SB 117") steps directly into the tension between Colorado law and federal law regarding cannabis and hemp. On the Colorado side, statute recognizes industrial hemp as an agricultural product, and Colorado water law states that a holder of a valid water right can put that right to its decreed beneficial use.¹ Thus, Colorado farmers with agricultural water rights can use their water to cultivate hemp under Colorado law. On the federal side, there is the Controlled Substance Act of 1970, which classifies cannabis and hemp as Schedule 1 drugs.² Because of the federal prohibition, the Bureau of Reclamation ("Bureau") has issued notices warning water districts and users against using water from federal facilities in the cultivation of any federally illegal product.³

SB 117 was put forth to confirm industrial hemp as a recognized agricultural product in Colorado, with attendant water right use. Senator Don Coram, Representative Marc Catlin, and Representative Donald Valdez sponsored the bill. It passed the Senate with a vote of thirty-four to one, and passed the House with a vote of sixty-four to zero. Governor Hickenlooper signed the bill into law on May 21, 2017.

While a state law cannot impose a barrier on the enforcement of federal regulations, the bill's sponsors hoped that it would level the playing field across the state when it comes to water use involving the Bureau. Some farmers are having their water rights restricted by the Bureau for growing hemp, while farmers in other parts of the state are not. Confirming hemp as a legitimate agricultural product, and pointing out the relevant inconsistencies, is meant to reinforce that the Bureau does not have legal control over water with decreed Colorado rights even if it moves through the Bureau's infrastructure. Passing the bill has the added benefit of putting the federal government on notice regarding both Colorado's commitment to protecting its citizens' water rights and the issues caused by the continued federal prohibition of a legitimate agricultural product.

There were two arguments against SB 117: first, the naming of a specific agricultural product in a statute; and second, the tension between federal and Colorado state laws. The naming issue was resolved by an amendment that replaced the specific industrial hemp recognition to recognition of any agricultural product under Title 35 of the Colorado Revised Statutes, which includes industrial hemp. This change allayed the Colorado Farm Bureau's worry of setting

1. COLO. REV. STAT. §§ 35-61-101, *et seq.*; § 37-92-102.

2. 21 U.S.C. § 812(c) (2012).

3. U.S. BUREAU OF RECLAMATION, PEC TRMR-63, *Use of Reclamation Water or Facilities for Activities Prohibited by the Controlled Substances Act of 1970* (2017), https://www.usbr.gov/recman/temporary_releases/pectrmr-63.pdf.