

2017

S.B. 17-117, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017)

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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.

precedent that could require permission from the state for the crops farmers can grow.

The federal problem was not so easily resolved. Speaking in opposition to the bill, representatives from the Colorado Water Congress, the Colorado Farm Bureau, and the Southeastern Colorado Water Conservancy District argued that this problem requires a statutory solution at the federal level. Barring a federal change, the Bureau must report any use of federal water in the cultivation of a federally illegal crop to the Department of Justice, and any person, at any level, facilitating such water use could be held criminally liable (this issue has been avoided in the recreational cannabis market because most of those grow operations use municipal water provided by a careful balance of co-mingled water in federal facilities and other priority water).

Sponsors and supporters of the bill (including Diamond A Farms, the Lower Arkansas Valley Water Conservancy District, the Hoban Law Group, and the National Hemp Association) argue that the law is on their side. The Tenth Amendment allows Colorado to decide on water use in the state, and the law of the land is prior appropriation. Because a water right in Colorado does not mean ownership of the water itself, but ownership of the right to use that water, a farmer's water being co-mingled with federal water (or being stored in or passing through a federal facility) should have no effect on that farmer's water right. From this point of view, the Bureau's restricting of that water violates Colorado's sovereignty.

Additionally, some federal statutes favor hemp. The U.S. Farm Bill allows the use of industrial hemp for agricultural research purposes.⁴ The Omnibus Appropriations Bill states that "[n]one of the funds made available by this Act or any other Act may be used . . . to prohibit the transportation, processing, sale, or use of industrial hemp."⁵ SB 117 quotes both of these bills as evidence of industrial hemp's legitimacy as an agricultural product.

There are practical considerations that mitigate the federal state tension, as well. While the Bureau must report any use of federal water to grow illegal products to the Department of Justice, the Department still has prosecutorial discretion to decide whether to prosecute those activities. While the scale of these grow operations would allow the department to file serious charges, hemp is a very low priority for criminal prosecution. Given that low priority, and the statutory support for hemp discussed above, supporters of SB 117 argued that the federal government has little to gain (and much political capital to lose) by prosecuting farmers growing a legal product with legal water.

SB 117 does not resolve the tension between Colorado and the federal government on the issue of hemp. What it does is combat inconsistencies in Colorado water use created by federal policy, puts Congress on notice that a timely federal resolution to this problem is necessary, and announces to Colorado farmers that the state is committed to protecting their land, their livelihood, and their water.

Joseph Chase

4. Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912-14 (2014).

5. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 763, 129 Stat. 2242, 2285 (2015).