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St. Jude Revisits: Commentary on the Interplay of Ditch Rights, Prior Appropriation Water Rights, and Colorado's Disavowal of Riparian Rights

ST. JUDE REVISITS: COMMENTARY ON THE INTERPLAY OF DITCH RIGHTS, PRIOR APPROPRIATION WATER RIGHTS, AND COLORADO'S DISAVOWAL OF RIPARIAN RIGHTS

JUSTICE GREGORY J. HOBBS, JR.*

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I. INTRODUCTION

In June 2015, the Colorado Supreme Court (“Court”) decided two cases involving ditch rights and water rights. On June 1, the Court’s *Frees v. Tidd* decision upheld issuance of a conditional water right decree for hydropower use to the owner of land burdened by a ditch.¹ On June 29, the Court’s *St. Jude’s II* decision disallowed issuance of an absolute water right to the owner of a ditch for flow-through aesthetic, recreation, and piscatorial uses without impoundment.² Both decisions harken back to the Court’s 2001 *St. Jude’s I* decision involving the nature, scope, and operation of ditch rights within the design of constitutional and statutory rights for use of the public’s water resource.³

II. THE WATER TRILOGY PROVISIONS OF COLORADO WATER LAW

A ditch is a conveyance structure for transporting a portion of the public’s water resource, lawfully appropriated for beneficial use, to its place of use as defined in Colorado’s Constitution and statutes. The Colorado Constitution’s water trilogy provisions establish: (i) the public owns the water within Colorado and it is subject to appropriation by governmental entities and private persons;⁴

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1. *Frees v. Tidd*, 349 P.3d 259, 268 (Colo. 2015).

2. *St. Jude’s Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 451 (Colo. 2015), hereinafter *St. Jude’s II*.

3. *Roaring Fork Club, L.P. v. St. Jude’s Company*, 36 P.3d 1229, 1231 (Colo. 2001), hereinafter *St. Jude’s I*.

4. Colo. Const. art. XVI, § 5 (“The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the

(ii) the right to divert the unappropriated waters of the natural stream to beneficial uses shall never be denied;⁵ and (iii) all persons and corporations shall have the right to construct ditches across the lands of others for the conveyance of water.⁶ Since the 1858 Gold Rush, Colorado has grown up through the conjunction of ditch rights and water-use rights.⁷

No more eloquent statement about this truth exists than a Justice Rebecca Kourlis passage in the *St. Jude's I* decision. She invokes the 1861 Territorial Legislature's very first action, which established prior appropriation rights, disavowed riparian-based water rights, and instituted the right of ditch construction for conveyance of water from a stream to its place of beneficial use:

Ditches are important to Colorado. They permit a landscape, economy, and history in which fertile valleys prosper. Without them, properties adjacent to or distant from water courses wither. Colorado is not a riparian state in which only those lands adjacent to the streams and rivers have rights to water. Rather, as early as the tenure of the territorial legislature, our lawmakers recognized that our arid climate required the creation of a right to appropriate and convey water across the land of another so the lands not immediately proximate to water could be used and developed.⁸

Neighborly disputes about and along ditches resonate in Colorado's history, and its land and water laws. If St. Jude be the patron saint of lost causes, let us not lose the lesson the Roaring Fork — recreational versus St. Jude's — irrigation conflict taught. Herein play the inter-workings of Colorado's constitutional and statutory water underpinnings. Our newer economies are more dependent than ever upon maintenance of our traditional economies.

III. WHAT IS NOT A BENEFICIAL USE RIGHT

In *St. Jude's I*, the Roaring Fork Club ("Club") unilaterally altered ditches that historically ran irrigation water for St. Jude's Ranch ("Ranch") use.⁹ The Club "excavated within Ranch's rights-of-way, graded, and destroyed ditch banks and portions of ditches, realigned ditch channels, diverted ditch water flows, piped portions of ditches, constructed cabins and golf course greens within the easements, and temporarily piped wastewater into one of the

same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided").

5. Colo. Const. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied").

6. Colorado Const. art. XVI, § 7 ("All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation"); see also COLO. REV. STAT. § 37-86-102, (2015) ("Any person owning a water right or conditional water right shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water for beneficial use in accordance with said water right or conditional water right").

7. See, e.g., ROBERT R. CRIFASI, A LAND MADE FROM WATER, APPROPRIATION AND THE EVOLUTION OF COLORADO'S LANDSCAPE, DITCHES, AND WATER INSTITUTIONS (2015) (centering on nineteenth century settlers' construction and operation of Boulder County ditches).

8. *St. Jude's I*, 36 P.3d at 1231-32 (citing Colorado Territorial Laws 67, Section 2 (1861)).

9. *Id.* at 1230.

ditches.”¹⁰

The Court rejected the Club’s self-help trespass upon St. Jude’s ditch easement.¹¹ It instituted a judicial mechanism for resolving the burdened owner and the benefitted owner’s competing property interests should the parties not agree upon a change to the easement.¹² The underlying property owner seeking to unilaterally alter the ditch easement must demonstrate that (i) “the maintenance rights of the owner of the ditch easement” are not “adversely affected by the change,” and (ii) “the water provided to the ditch easement owner must be of the same quantity, quality, and timing as provided under the ditch owner’s water rights and easement rights in the ditch.”¹³

A ditch right-of-way for the conveyance of water to its place of use is a vested property right.¹⁴ So, too, is the water use right associated with the ditch.¹⁵ Both are essential to Colorado’s prior appropriation system for enforcement of adjudicated beneficial uses under the State’s rule of law.

In *St. Jude’s II*, the Court rejected the Club’s claim to turn the public’s natural stream into a private artificial stream.¹⁶ The absolute decree application sought a flow-through diversion from the Roaring Fork River for a half-mile length of ditch.¹⁷ The Club claimed the beneficial purposes encompassed “aesthetic and recreational amenity to a golf course development, as well as for fish habitat and as a private fly-fishing stream.”¹⁸ The Club characterized its need for ditch-full flows as a “piscatorial use” entailing a “challenging recreational fishing experience.”¹⁹

The Court held such purposes are not among the beneficial use purposes allowed under Colorado’s water law.²⁰ The Court’s opinion, authored by Justice Nathan B. Coats, likens such a diversion to a forbidden riparian right.²¹ The opinion recites how the Colorado General Assembly carefully stewarded and restricted public agency appropriations for instream flow and recreational in-channel beneficial uses, and determines such a ditch flow-through diversion is wasteful, not beneficial, under the law:

The Club’s proposed ‘uses’ of the water in question, as expressed in its application, cannot be beneficial within the meaning of the Act because the only purpose they are offered to serve is the subjective enjoyment of the Club’s private guests. The flow of water necessary to *efficiently* produce beauty, excitement, or fun cannot even conceptually be quantified, and therefore where these kinds of subjective experiences are recognized by the legislature to be valuable, it has specifically provided for their public enjoyment, scientific ad-

10. *See id.* at 1230

11. *Id.* at 1238.

12. *See id.* at 1238.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See St. Jude’s II*, 351 P.3d at 445.

17. *Id.* at 446.

18. *Id.*

19. *Id.* at 451.

20. *Id.*

21. *Id.*

ministration, and careful measurement. *See, e.g.*, § 37-92-102 (restricting appropriation of instream flows and in-channel diversions to particular purposes and amounts as determined by a state agency bound by fiduciary duty, and with public participation). Without describing a purpose for the accomplishment of which a measurable amount of water, however approximate, must be used, the Club, by definition, fails to articulate an intent to put the *specific amount* of water it claims to a beneficial use.

Recognition of the Club's proposed uses would substantially undermine the intent evident in the legislature's instream flow and [Recreational In-Channel Diversions] ("RICD") provisions. The General Assembly has taken great care to limit recreational and environmental uses of water in-channel, largely to deal with the potential dangers and excesses inherent in capturing the flow of the stream. The Club would indisputably be barred from appropriating rights for its asserted uses were the water in question to remain in the natural course of the Roaring Fork River. *See* sections 37-92-102(3), -103(4). In effect, the Club seeks to accomplish by virtue of diversion what the legislature has expressly prohibited instream: By using a diversion to effectively change the path of a natural stream or a significant portion of it, the Club seeks approval for recreating a natural stream on its private property and adjudicating the rights to enjoy the flows therein. This appropriation is tantamount to a 'forbidden riparian right.' Because an appropriation requires actual application of a portion of the waters of the state to a beneficial use,²² the Club cannot acquire such a forbidden right simply by virtue of diversion.

The Court issued Justice Allison Eid's instream flow decision in *Farmers Water v. Colorado Water Conservation Board* only two months before it sat to decide *St. Jude's II*.²³ That opinion gives effect to the General Assembly's delegation of quasi-legislative authority to a public agency for the appropriation of flow rights.²⁴ These flow rights are restricted to certain reaches of the natural stream under parameters containing articulated limitations, and in accordance with a public comment process preceding the Colorado Water Conservation Board's ("CWCB") water court application. Instream flow legislation forwards "the public's interest in the preservation of the environment."²⁵ The CWCB makes such a flow-right appropriation in the name of the people and carries forth "a fiduciary duty arising out of the CWCB's unique statutory duties."²⁶

The Court's *St. Jude's II* opinion resounds in the limitations against excess diversions, set forth originally in a 1876 ditch law, still codified in Section 37-84-108: "During the summer season a person shall not run through his or her irrigating ditch any greater quantity of water than is absolutely necessary for irrigating, domestic, and stock purposes to prevent the wasting and useless discharge and running away of water."²⁷ As Justice Coats pointed out, the flow-through ditch diversion the Club claimed, in absence of a specific legislative

22. *Id.*

23. *See* *Farmers Water Dev. Co. v. Colorado Water Conservation Bd.*, 346 P.3d 52, 54 (2015).

24. *Id.*

25. *Id.* at 58.

26. *Id.*

27. COLO. REV. STAT. § 37-84-108(1).

authorization, contrasts markedly to the General Assembly's express authorization for a diversion impounded for recreational, fishery, or wildlife purposes under Section 37-92-103(4)(a).²⁸

St. Jude's II cannot be viewed as affecting or modifying, in any way, the Court's holding in *Upper Gunnison*, which approves the diversion, capture, storage, and release of water in a specific amount followed by its subsequent release into a reach of the stream, in order to manage and enhance fishery and recreational uses of the stream.²⁹ In that case, the Court rejected an assertion that such a beneficial use of the appropriated water impermissibly granted an instream flow water right to an appropriator other than the CWCB.³⁰ Rather, *St. Jude's II* relies on a longstanding foundation of water law, that the mere diversion of water of itself, does not establish a beneficial use.³¹ "The content and boundaries of 'beneficial use' requires careful case-by-case factual analysis," even as the panoply of lawful beneficial uses continues to expand as case law and statutory provisions plumb Colorado's changing economy and values.³² The troubling instance of a ditch being turned into a private fishing stream, through the mere diversion of the waters of the natural stream into and through the ditch, marks *St. Jude's II* as an outlier in Colorado's water jurisprudence. Although the dissent in *St. Jude's II* recites a contention in amicus briefs that water courts have previously entered decrees for the very type of flow-through purpose the Club claimed,³³ an examination of those individual decrees might or might not support such an assertion. Regardless, the Court did not accept an appeal in those cases testing the proposition. Whether or not there is a successful collateral attack against a previously adjudicated un-appealed final decree is a matter for further examination, if and when any person attempts to set it aside.³⁴

IV. SMALL HYDRO USE: A BURDENED LANDOWNER'S OPPORTUNITY

The Court's *Frees v. Tidd* decision, also issued in June 2015, addresses the interplay of ditch rights and water rights as well. That decision upholds a junior conditional water court decree for small hydropower use of water available at the head gate of a ditch running water for the senior water rights holder's irrigation use.³⁵ There, the owner of property burdened by the ditch easement benefited from a guiding principle enunciated in *St. Jude's I* – that courts should accommodate, where possible, the real property interests of both the dominant and servient estates involved in a ditch and water rights dispute.³⁶

28. *St. Jude's II*, 351 P.3d at 449.

29. Bd. of Cnty Comm'ns of the Cnty of Arapahoe v. Upper Gunnison River Water Conservancy Dist., 838 P.2d 840, 849-50 (Colo. 1992).

30. *Id.* at 854.

31. *See* Archuleta v. Gomez, 200 P.3d 333, 346 (Colo. 2009).

32. *See* Vance v. Wolfe, 205 P.3d 1165, 1172 (Colo. 2009).

33. *St. Jude's II*, 351 P. 3d at 460.

34. San Antonio, Los Pinos and Conjeos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist., 351 P.3d 1112, 1123 (Colo. 2015).

35. *Frees v. Tidd*, 349 P.3d at 268; *see* Christopher Ainscough, *New Opportunities for Small-scale Hydropower in Colorado*, 19 U. DENV. WATER L. REV. 2 (Spring 2016).

36. *St. Jude's I*, 36 P.3d. 1229, 1237-38 (Colo. 2001).

V. CONCLUSION

Beneficial use claims are not unbridled under Colorado water law. In instances involving a novel claim for an appropriative right, the state's supreme court on direct appeal from one of the seven water courts looks to constitutional, statutory, and case law in determining whether or not the claimed use is a legal use. Diverting water flow from a natural stream into, through, and out of the ditch back to the river, purely for a private, aesthetic, recreational, and challenging fly fishing experience, is a novel claim the Colorado Supreme Court had not previously considered.