



Legislative Council Staff
Research Note

Version: House Second
Reading
Date: 3/23/2017

Bill Number

House Bill 17-1190

Sponsors

***Representative Becker K.
(None)***

Short Title

***Limited Applicability Of St.
Jude's Co. Water Case***

Research Analyst

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Status

The bill is currently pending before the House on second reading. This research note reflects the introduced version of the bill as amended by the House Agriculture, Livestock, and Natural Resources Committee on March 13, 2017.

Background

Doctrine of Prior Appropriation. Under the Colorado Constitution, the water of every natural stream that is not claimed by a water right owner, called unappropriated water, is the property of the public and available for appropriation. Water rights are created by using water for a legally recognized use, such as irrigation. Generally, a potential water user goes before a water court to determine if water may be removed from the stream without injuring existing water rights. If approved, a water judge sets a priority for the right to use a specific amount of water, the location of diversion, the purpose, and, if necessary, any conditions to protect senior water right holders. The earlier the date of the appropriation, the more "senior" the water right and the more value it has. A water right is considered to be a property interest that may be sold or transferred, provided that no other water right is injured and the transfer is approved by a water judge. Water rights have been granted for most of the stream flows in the state or obligated to downstream states through interstate compacts.

Types of water rights. Water rights may be obtained for a number of legally recognized beneficial uses. Agricultural, domestic, and mining are the oldest types of legally recognized uses. Other uses include power generation, snow making, stock watering, fire protection, and dust suppression. Colorado also recognizes the preservation of natural habitat and water-based recreation as beneficial uses of water.

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St. Jude's Co. v. Roaring Fork Club, LLC, 351 P.3d 442 (Colo. 2015). Roaring Fork Club (the Club) owns a private resort along the Roaring Fork River, near Aspen, that provides members and guests with golfing, fishing, residential, and recreational amenities. The resort is located upstream from a contiguous parcel where St. Jude's Company (St. Jude's) conducts agricultural operations. The two parties have water rights that are diverted from the same headgate located on the Club's property. In 2007, the Club filed two applications with the water court in Water Division 5. One application requested a decree of new appropriative water rights and a change in the point of diversion of an existing water right. The Club sought new appropriative rights for "aesthetic, recreation, and piscatorial uses" because it claimed that since 2001, it had diverted 21 cubic feet per second (cfs) from the Roaring Fork River into its ditch. The Club also sought to correct the legal description of an existing right's point of diversion to its actual location. The second application proposed an augmentation plan for the ditch to account for "evaporative depletions."

St. Jude's opposed both of the Club's applications because St. Jude's was concerned that those changes would adversely affect its downstream water rights. St. Jude's also alleged that the Club was wrongfully denying it access to and use of the headgate on the Club's property, in violation of the two entities' prior agreements and Colorado water law.

The water court in Water District 5 approved both of the Club's applications and decreed the Club new appropriative rights for "aesthetic, recreation, and piscatorial uses." On appeal, the Colorado Supreme Court addressed whether the Club's diversion was a beneficial use under state law. The Court found that the Club's applications for aesthetic, recreation, and piscatorial uses did not fit under the definition of beneficial use. The Court also found that the Club's application of water was "passive" in nature and reasoned that putting water to use required the water be used actively or for a type of service. Further, the Court ruled that even if the Club's uses were active applications of water, the Club was still not putting that water to beneficial use because, the Club's uses only serve the enjoyment of its guests. The Court concluded that "the flow of water necessary to efficiently produce beauty, excitement, or fun" cannot be quantified, and there is no way to properly limit such use. Accordingly, the Court reversed the District 5 water court's order decreeing new appropriative rights to the Club, while affirming the rest of the court's rulings.

House Action

House Agriculture, Livestock, and Natural Resources Committee (March 13, 2017). At the hearing, the committee heard testimony in support of the bill from representatives from the Colorado River District, Colorado Water Congress, the Creekside Coalition, Eagle River Water and Sanitation District, and the Colorado Farm Bureau. Representatives from the Water Rights Association of the South Platte and the South Metro Water Supply Authority had a neutral position on the bill, and asserted support for the bill if it were amended.

The committee adopted amendment L.001 and amendment L.002, and referred the bill, as amended to the committee of the whole. Amendment L.001 limits the change in use applications available to water rights involving aesthetic, recreational, and piscatorial uses to applications that change the point of diversion. The amendment also clarifies that the bill does not affect future and existing water rights for Colorado Parks and Wildlife. Amendment L.002 clarifies that the bill does not create any new type of water rights or beneficial uses.

Senate Action

Relevant Research