

**SAVE SOME FOR THE FISHES:  
ANALYZING THE *ST. JUDE'S CO.*  
DECISION AND WHAT IT MEANS FOR  
BENEFICIAL USE IN COLORADO**

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## INTRODUCTION

“Whiskey is for drinking and water is for fighting over.” Nowhere is that quote, often attributed to Mark Twain, truer than in the arid lands of Colorado.<sup>1</sup> In the 1874 Water Wars, a conflict over water on the Cache la Poudre River claimed several lives, including a judge shot in his courtroom.<sup>2</sup> Today’s fights still take place in the courtroom (thankfully without gunplay), yet they are no less controversial. With fewer than twenty inches of annual rainfall,<sup>3</sup> the life and livelihood of many Coloradoans depends on their ability to get and keep water rights.<sup>4</sup>

Colorado administers water rights under the prior appropriation system, where a water right is acquired through the physical diversion of water away from its stream bed and, most importantly, applied to a beneficial use.<sup>5</sup> In *St. Jude’s Co.*

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1. *Whiskey Is For Drinking; Water Is For Fighting Over*, QUOTE INVESTIGATOR (June 3, 2013), <http://quoteinvestigator.com/2013/06/03/whiskey-water/> [https://perma.cc/L7YK-YZYJ].

2. Jessie Romero, *Water Wars*, 17 *ECON. FOCUS* 38, 38 (2013).

3. Nolan Doesken et al., *The Plains of Colorado*, COLORADO CLIMATE CENTER, <http://climate.colostate.edu/climateofcolorado.php> (last updated Jan. 2003) [https://perma.cc/46B3-E3U9]. The average annual rainfall in Colorado is only seventeen inches. *Id.*

4. See *The 100th Meridian*, NEB. STATE HISTORICAL SOC’Y (2004), [http://www.nebraskahistory.org/publish/markers/texts/100th\\_meridian.htm](http://www.nebraskahistory.org/publish/markers/texts/100th_meridian.htm) [https://perma.cc/4SA5-9CKN] (describing how lands west of the 100th Meridian typically receive less than twenty inches of rainfall annually and therefore must be irrigated in order to grow crops).

5. Gregory J. Clifton & Paul J. Zilis, *Recent Developments in Appropriations*

*v. Roaring Fork, LLC*,<sup>6</sup> the Colorado Supreme Court ignored precedent by altering the definition of beneficial use in a way that will have far-reaching and detrimental impacts for Colorado. The court's decision to categorically exclude aesthetic, recreational, and piscatorial uses as beneficial is contrary to the statutory and common law history of Colorado water law.<sup>7</sup> This decision could have both environmental and economic impacts as it will restrict the development of nonconsumptive uses of water. Barring a reversal of the decision, the only viable solution is to amend Colo. Rev. Stat. § 37-92-103(4) to include aesthetic, recreational, and piscatorial uses of water as beneficial for the purposes of acquiring a water right in Colorado.

This Note first analyzes the legal background of water rights law in Colorado, discussing specifically how water rights are acquired, and then introduces the factual background of the *St. Jude's Co.* decision. Next, it critiques that decision and highlights various problems that could arise as a result. Finally, this Note offers a potential solution to those problems, in the form of an amendment to Colo. Rev. Stat. section 37-92-103(4), which would again allow for beneficial aesthetic, recreational, and piscatorial uses.

## I. THE *ST. JUDE'S CO.* DECISION

### A. *Legal Background*

The outcome of this case, and perhaps the future of water law in Colorado, depends on how “beneficial use” is defined. However, because Colorado water law is so unique, a general overview of the Colorado Doctrine<sup>8</sup> is required to better understand the intricacies and potential fallout—including the environmental and economic consequences—from the *St.*

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*for Instream Uses*, 22 COLO. LAW. 987, 987 (1993).

6. 351 P.3d 442, 452 (Colo. 2015).

7. See *infra* section I.D.2.

8. The Colorado Doctrine is another name for the prior appropriation system of water rights adjudication. Theron Josephson, *Colorado Doctrine*, ENCYCLOPEDIA OF THE GREAT PLAINS (2011), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.wat.006> [<https://perma.cc/8CT6-6D28>]. The doctrine originated in Colorado (hence the name) in the late 1800s. *Id.* Several other mountain west states, including Wyoming (1896), New Mexico (1900), and Montana (1921) have since adopted a version of the Colorado Doctrine. *Id.*

*Jude's Co.* decision.

### 1. How to Acquire a Water Right in Colorado

Water rights in Colorado are distributed under the doctrine of prior appropriation. This system—as opposed to the riparian system, in which property owners own the water that borders their property<sup>9</sup>—is best understood as “first in time, first in right.”<sup>10</sup> Therefore, whoever is the first party to claim the water (the senior) has a right to that water over all subsequent appropriators (the juniors).<sup>11</sup> That means that the senior can call<sup>12</sup> for its entire water right before the first junior can divert, and the first junior must get its entire right before the next junior can divert, and so on and so forth down the line until the entire stream is appropriated.<sup>13</sup>

The prior appropriation system was in place in Colorado before statehood,<sup>14</sup> and was later ratified by the Colorado Constitution.<sup>15</sup> In the ensuing decades, courts and the Colorado General Assembly have stepped in to impose certain stipulations regarding how users can claim a water right in

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9. *Riparian Doctrine*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/riparian\\_doctrine](https://www.law.cornell.edu/wex/riparian_doctrine) (last visited Mar. 15, 2016) [<https://perma.cc/3UKR-HPH6>].

10. Sarah A. Klahn, *The Colorado Doctrine of Prior Appropriation*, in 2A COLO. PRAC., METHODS OF PRACTICE § 76:1 (6th ed. West 2016).

11. *Id.*

12. A call is a senior water right owner asking the division water engineer for enforcement of his water right in a situation where he is not getting his full decree. *Water Rights Dictionary*, COLO. DEPT OF NAT. RES., <http://water.state.co.us/SurfaceWater/SWRights/Pages/WaterRightsTerminology.aspx> (last visited Feb. 25, 2017) [<https://perma.cc/G72W-7H7Y>]. The call is put in to the division water engineer, who then analyzes the amount of water currently in the stream. *Id.* The engineer may then shut off junior water right owners' headgates or undertake other similar steps to ensure that the senior gets its water. *Id.* The call establishes the water right priority required to divert and has a specific date and time; after that only those users senior to the call may divert. *Id.*

13. *Id.*

14. *Armstrong v. Larimer Cty. Ditch Co.*, 27 P. 235, 237–38 (Colo. App. 1891).

15. The Colorado Constitution provides: “The water of every natural stream . . . is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.” COLO. CONST. art. XVI, § 5. Additionally, “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied,” and “priority of appropriation shall give the better right.” *Id.* § 6. In 1882, the Colorado Supreme Court definitively held that no waters in Colorado were to be governed by the riparian system—prior appropriation was the law of the land. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882).

the state. Most notably, the water must be “diverted”<sup>16</sup> and put to a “beneficial use.”<sup>17</sup> While both terms have been disputed and litigated throughout Colorado’s history, the *St. Jude’s Co.* case turns on the definition of beneficial use and what specific uses can qualify as beneficial for the purposes of appropriating a water right under Colorado law. The beneficial use requirement was created as a matter of policy in an attempt to ensure that Colorado’s limited water was used to achieve maximum benefits.<sup>18</sup> The legislature did not want users to waste water, or stockpile it, when other users could have been putting it to beneficial use, thereby spurring development across the state.<sup>19</sup>

Although beneficial use has largely been defined by the

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16. Colo. Rev. Stat. section 37-92-103(7) defines “divert” as follows: removing water from its natural course or location, or controlling water in its natural course or location, by means of a control structure, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device; except that, on and after January 1, 2001, only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may file an application to control water in its natural course or location by means of a control structure for recreational in-channel diversions.

COLO. REV. STAT. § 37-92-103(7) (2016). Diversion is mentioned only once in the Colorado Constitution and was not a statutory element of prior appropriation until the Water Right Determination and Administration Act of 1969. Clifton & Zillis, *supra* note 5, at 987. Courts have split on exactly how much diversion is required. *Id.* In 1960, the Colorado Supreme Court held that the “only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.” *Town of Genoa v. Westfall*, 349 P.2d 370, 378 (Colo. 1960). The court reached that decision after stating that the “true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial.” *Id.* (citing *Thomas v. Guiraud*, 6 Colo. 531, 553 (1883)). Following the *Town of Genoa* decision, it appeared that the diversion issue was settled, but only five years later the same Colorado Supreme Court denied an application for the appropriation of water for fishery enhancement. *See Colo. River Water Conserv. Dist. v. Rocky Mtn. Power Co.*, 406 P.2d 798 (Colo. 1965). The Colorado Supreme Court held that maintaining a natural stream flow for the enhancement of fish life could not constitute an appropriation because it did not involve an actual diversion of water from the stream. *Id.* at 800.

17. COLO. CONST. art. VXi, § 6; *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34 (Colo. 1997) (“A water right comes into existence by applying state water to beneficial use.”).

18. *See generally* CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 231–35 (1992).

19. *See generally* BARTON H. THOMPSON, JR., JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 192–94 (5th ed., 2013).

courts, in 1969 the Colorado General Assembly passed the Water Right Determination and Administration Act, which defined beneficial use as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.”<sup>20</sup> This is an undoubtedly broad definition; however, the General Assembly has since amended the law to mention specific beneficial uses, including impoundment of water for firefighting, fishing, recreation, recreational in-channel diversions<sup>21</sup> (although not for private parties), and the state’s instream flow program.<sup>22</sup> Importantly, the statute clearly states that the list of those beneficial uses does not limit “the generality of the previous sentence.”<sup>23</sup> As a result, decrees<sup>24</sup> have been issued for numerous other beneficial uses throughout the state, including groundwater recharge, silviculture (controlling the growth and health of forests), and snowmaking.<sup>25</sup>

## 2. Beneficial Use at Common Law

The Colorado Constitution does not define either “use” or “beneficial use.”<sup>26</sup> Although the Constitution mentions a preference for domestic, agricultural, and manufacturing

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20. COLO. REV. STAT. § 37-92-103(4) (2016).

21. See discussion *infra*, section I.D.1.

22. COLO. REV. STAT. § 37-92-103(4)(a)–(c). In 1973, the Colorado General Assembly amended the 1969 Act by giving the Colorado Water Conservation Board (CWCB) the authority to appropriate “minimum stream flows” to “preserve the natural environment to a reasonable degree.” See Clifton & Zilis, *supra* note 5, at 988; COLO. REV. STAT. §37-92-102(4). The instream flow program was later challenged, and upheld, as constitutional. *Colo. Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 573 (Colo. 1979) (holding that diversion is not a constitutional requirement of an appropriation because “divert” appears only once in the Constitution and that reference was merely intended to “negate any thought that Colorado would follow the riparian doctrine in the acquisition and use of water”).

23. COLO. REV. STAT. § 37-92-103(4).

24. A decree is the “official document issued by the court defining the priority, amount, use, and location of the water right.” R. Waskom & M. Neibauer, *Glossary of Water Terminology*, COLO. ST. UNIV. EXTENSION (May 2012), <http://extension.colostate.edu/topic-areas/agriculture/glossary-of-water-terminology-4-717/> [https://perma.cc/ZQE5-YTAU].

25. *What Are Beneficial Uses?*, PRODUCED WATER TREATMENT & BENEFICIAL USE INFO. CTR., COLO. SCH. OF MINES, [http://aqwatec.mines.edu/produced\\_water/intro/what/index.htm](http://aqwatec.mines.edu/produced_water/intro/what/index.htm) (last visited Feb. 15, 2016) [https://perma.cc/N6T2-UAJR].

26. COLO. CONST. art. XVI, §§ 5–6.

uses,<sup>27</sup> what other uses can qualify as beneficial is a question of fact for the courts to decide.<sup>28</sup> Exactly how and why courts have decided what uses are beneficial will be examined in depth in the critique of the *St. Jude's Co.* decision below.

### B. *Factual Background*

Roaring Fork Club, L.L.C. (the Club) is a private golf, fishing, recreational, and residential resort near Basalt, Colorado.<sup>29</sup> In March 2007, the Club filed two water applications in Water Division 5.<sup>30</sup> In the first application, “the Club sought a decree for new appropriative rights and a change in the point of diversion for an existing right.”<sup>31</sup> The application claimed that “since 2001, the Club had diverted 21 cubic feet per second (cfs) from the Roaring Fork River.”<sup>32</sup> The Club had been diverting the water into the RFC Ditch (the Ditch), a flow-through structure located entirely on the Club’s property, before returning the water to the Roaring Fork River approximately one-half mile downstream.<sup>33</sup> The Club was using the water for an “aesthetic and recreational amenity to a golf course development, . . . fish habitat and . . . a private fly-fishing stream.”<sup>34</sup> Therefore, the application sought the water for “aesthetic, recreational, and piscatorial uses.”<sup>35</sup>

St. Jude’s Co., an agricultural business, filed a statement

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27. *Id.* § 6.

28. *City & Cty. of Denver v. Sheriff*, 96 P.2d 836, 842 (Colo. 1939) (“What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case.”).

29. *St. Jude’s Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 446 (Colo. 2015).

30. *Id.* Water disputes in Colorado are handled through the state’s system of water courts. *Water Courts*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/Courts/Water/> (last visited Jan. 24, 2016) [<https://perma.cc/T59L-MN7J>]. The Water Right Determination and Administration Act of 1969 created seven water divisions based upon the largest river basins. *Id.* Each basin has its own water judge, appointed by the Colorado Supreme Court. *Id.* The water judges are district judges that have jurisdiction in the determination of water rights, the use and administration of water, and all other water matters within the water division. *Id.* Water lawsuits are initially adjudicated in the water court of the district in which the conflict arose. *Id.* Appeals then go directly to the Colorado Supreme Court. *Id.*

31. *St. Jude’s Co.*, 351 P.3d at 446.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

of opposition to the Club's application.<sup>36</sup> St. Jude's Co. alleged that it had "water rights in the Roaring Fork River, that it currently diverted at the RFC Headgate<sup>37</sup> and through the Ditch, and that its rights would be adversely affected" if the Club's application was granted.<sup>38</sup> At trial, the court "found that the Club had applied its proposed water right . . . to beneficial use."<sup>39</sup> Specifically, the trial court found that the Ditch was stocked and fished by the Club and that the higher flow rates made fishing more challenging.<sup>40</sup> The court also found that the Ditch was "an amenity and feature" of the Club's golf course, that the Ditch was enjoyed as a "visual aesthetic amenity," and that the higher flows amounted to "a better visual quality. . . in support of its aesthetic purpose."<sup>41</sup> Consequently, the water court decreed the Club the rights for "aesthetic, recreational, and piscatorial uses."<sup>42</sup> St. Jude's Co. then appealed to the Colorado Supreme Court;<sup>43</sup> after briefing and oral argument, the court ordered supplemental briefing on the question of whether "a diversion into and through a ditch for piscatorial and aesthetic purposes, without impoundment, is a beneficial use under Colorado water law."<sup>44</sup>

### C. Holding

The Colorado Supreme Court drastically altered the definition of beneficial use in Colorado when it held that aesthetic, recreational, and piscatorial uses are not beneficial for the purposes of prior appropriation.<sup>45</sup> As mentioned above, there were several different claims brought before the Colorado

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36. *Id.*

37. A headgate is the structure through which someone can control the amount of water that is diverted out of the stream. *See Waskom & Neibauer, supra* note 24.

38. *Id.*

39. *St. Jude's Co.*, 351 P.3d at 446.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Colorado Supreme Court*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/Supreme\\_Court/Index.cfm](https://www.courts.state.co.us/Courts/Supreme_Court/Index.cfm) (last visited Nov. 12, 2015) [<https://perma.cc/F9GL-8W32>] (explaining that the Colorado Supreme Court has direct appellate jurisdiction over cases involving the adjudication of water rights).

44. *St. Jude's Co.*, 351 P.3d at 447–48.

45. *Id.* at 445.

Supreme Court.<sup>46</sup> However, it is the court's ruling on what constitutes a beneficial use that will have widespread impacts on Colorado. According to the majority opinion, "the Club failed to demonstrate an intent to apply the amount of water for which it sought a decree to any beneficial use."<sup>47</sup> In essence, the majority found that aesthetic, recreational, and piscatorial uses were categorically not beneficial under either "the constitution or [the] statutes."<sup>48</sup>

#### *D. Critique of the Decision*

When both the statutory and common law history of beneficial use in Colorado is examined, it is clear that the Club's three uses fit any standard of beneficial use that has been used to date. Justice Márquez dissented in part and concurred in part,<sup>49</sup> concluding that not only are aesthetic, recreational, and piscatorial uses beneficial under Colorado water law, but also that the record in the *St. Jude's Co.* case supports the water court's finding that the Club needed the applied for amount to sustain those uses.<sup>50</sup> This section critiques six sub-holdings of the case to show that aesthetic, recreational, and piscatorial uses all fall well within any definition of beneficial use.

The most important finding of the court was that not only did the Club fail to demonstrate that aesthetic, recreational, and piscatorial uses were beneficial in this case, it is likely that they *never* could be.<sup>51</sup> The majority could have said that the Club simply failed to demonstrate how their uses were beneficial. Instead, the court went one step further to say that it is likely that those uses *never* could be beneficial under Colorado water law.<sup>52</sup> To reach this finding, the court relied on *Colorado River Water Conservation District v. Rocky Mountain*

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46. *See id.* at 446.

47. *Id.* at 445.

48. *Id.*

49. The majority's 5-2 decision was written by Justice Coats, with Justice Hood joining Justice Márquez's dissent. *Id.* at 442. Interestingly, Justice Hobbs, long considered the court's water expert, did not author an opinion.

50. *Id.* at 457.

51. *Id.* at 451 ("[T]he Club's asserted aesthetic, recreation, and piscatorial uses, even when proven as alleged, *do not* qualify as beneficial uses under the 1969 Act.") (emphasis added).

52. *Id.*

*Power Co.*<sup>53</sup> In that case, the court denied an appropriation where the water was not diverted but rather “preserved and kept in the stream . . . for the preservation of fish life and the propagation of fish.”<sup>54</sup> The *St. Jude’s Co.* court then used that precedent to hold that “the right to the maintenance of the ‘flow’ of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation.”<sup>55</sup> But the majority failed to recognize that the *Rocky Mountain Power Co.* appropriation was not denied because of its piscatorial purpose, but rather because the water was never diverted from the stream.<sup>56</sup> In fact, the *Rocky Mountain Power Co.* court even implied that a minimum flow for piscatorial purposes *could* be appropriated so long as the water was diverted from the natural course of the stream.<sup>57</sup> Therefore, the *St. Jude’s Co.* decision to categorically exclude the uses from ever being beneficial went far beyond the scope of *Rocky Mountain Power Co.*

1. The Definition of “Beneficial Use” Is Not Limited by Either Art. XVI, Sec. 6, of the Colorado Constitution or C.R.S. Section 37-92-103(4).

Article XVI, section 6, of the Colorado Constitution states that “[p]riority of appropriation shall give the better right as between those using the water for the same purpose” before stating a preference for the possible purposes of domestic, agricultural, and manufacturing uses.<sup>58</sup> Although the Colorado Constitution prioritizes domestic uses first, and agricultural uses over manufacturing, it is clear that the text does not limit appropriations to those three uses. In 1999, the Colorado Supreme Court held that the meaning of beneficial use “tracks

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53. 406 P.2d 798 (1965).

54. *Id.* at 800.

55. *St. Jude’s Co.*, 351 P.3d at 448.

56. 406 P.2d at 800; *See also* Clifton & Zilis, *supra* note 5, at 988 (noting that in *Rocky Mountain Power Co.*, the Colorado Supreme Court denied the appropriation “because it did not involve an actual diversion of water from the stream”).

57. *Rocky Mountain Power Co.*, 406 P.2d at 800 (“There is no support in the law of this state for the proposition that a minimum flow of water may be ‘appropriated’ in a natural stream for piscatorial purposes without diversion of the water ‘appropriated’ from the natural course of the stream.”).

58. COLO. CONST. art. XVI, § 6.

legislative enactments, court decisions, and, principally, the acts of appropriators who control water to their purposes.”<sup>59</sup>

One such legislative enactment was Colo. Rev. Stat. section 37-92-103(4), which defines “beneficial use” as the “amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.”<sup>60</sup> Beyond that general statement, the legislature also explicitly listed several specific beneficial uses, where the “impoundment of water for firefighting or storage” includes “recreational, fishery, or wildlife purposes.”<sup>61</sup> The statute goes on to outline recreational in-channel diversions<sup>62</sup> (RICD)—an option not available to private parties—and the state’s instream flow (ISF) program. Importantly, the General Assembly made clear that the list of examples of possible beneficial uses is not exhaustive. The statute explicitly says the list is *not* intended to “limit the generality” of the broad definition of beneficial use, and that any use that is “reasonable and appropriate under reasonably efficient practices” will be considered beneficial.<sup>63</sup>

## 2. Statutes and Common Law Have Both Recognized Fishing as a Beneficial Use

The majority opinion states that the Club “clearly cannot be said to apply [its] water to a ‘beneficial use.’”<sup>64</sup> However, one of the Club’s principal uses of the water was fishing, and both statutes and common law recognize fishing as a beneficial use. Section 103(4)(a) specifically lists the storage of water for “recreational, fishery, and wildlife purposes” as *per se* beneficial.<sup>65</sup> While it is true that the Club was merely diverting the water through the Ditch, and not storing or impounding it in any way, Justice Márquez made a compelling point in her in part concurrence and in part dissent that there is no

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59. Santa Fe Trail Ranches Prop. Owners Ass’n v. Simpson, 990 P.2d 46, 53 n.9 (Colo. 1999).

60. COLO. REV. STAT. § 37-92-103(4) (2016).

61. *Id.* § 37-92-103(4)(a).

62. *Id.* § 37-92-103(4)(b); *see also infra* section I.D.2.

63. COLO. REV. STAT. § 37-92-103(4).

64. St. Jude’s Co. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 450 (Colo. 2015).

65. COLO. REV. STAT. § 37-92-103(4).

meaningful distinction between fishing in a reservoir<sup>66</sup> and fishing in a flow-through diversion.<sup>67</sup> She reasoned that section 103(4)(a) clarifies that recreational, fishery, or wildlife purposes can support a storage right because the storage of water itself is not enough to claim an appropriation.<sup>68</sup> That explains “why the legislature would identify the *storage* of water for recreational, fishery, or wildlife purposes . . . without explicitly recognizing the right to a flow-through diversion for the same purpose.”<sup>69</sup> To demonstrate how absurd this distinction is, imagine if the Club simply impounded the water into its own private lake for fishing (like in *Three Bells Ranch Associations*)<sup>70</sup> and then released it in controlled amounts back into the river—thereby “accidentally” creating a fly fishing stream. This would likely be acceptable as a beneficial use, and so it seems illogical to require the extra step of impoundment.

As another example, here is a hypothetical situation that could be allowed under the *St. Jude’s Co.* decision: A private party could build a dam to control their water from their diversion before sending it downstream in their private ditch before returning the water to the original stream. By building a dam, this new appropriation could possibly be valid under two different standards. First, the appropriation would be an “impoundment of water . . . for which an appropriation is lawfully made, including recreational, fishery, or wildlife purposes.”<sup>71</sup> Technically, this set-up would fit the definition, although it would not be the fishing pond contemplated by the legislature, and therefore it is likely that the Colorado Supreme Court would eliminate this work-around of the law.

However, the private party would have a stronger

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66. *Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass’n*, 758 P.2d 164, 173 (Colo. 1988). In that case, the plaintiffs wanted to fill in mining pits to create lakes that would be used for “recreation, including fishing areas and additional wildlife habitat.” *Id.* The court held that the use was clearly within the statutory definition of beneficial use. *Id.*

67. *St. Jude’s Co.*, 351 P.3d at 457 (Márquez, J., dissenting in part and concurring in part).

68. *Id.* (citing *Upper Yampa Water Conservancy Dist. v. Wolfe*, 255 P.3d 1108, 1111 (Colo. 2011) (affirming the water court’s decision that an applicant must “show *actual* storage and *actual* beneficial use of a specific amount of water” (emphasis in original))).

69. *St. Jude’s Co.*, 351 P.3d at 457–58 (Márquez, J., dissenting in part and concurring in part).

70. *See id.*

71. COLO. REV. STAT. § 37-92-103(4)(a) (2016).

argument that this type of diversion structure—a dam controlling the water into a new channel—is exactly what the court allowed in *City of Thornton v. City of Fort Collins*.<sup>72</sup> Because this diversion structure moves the water to a new channel, and does not simply control it instream like an RICD, it should be governed by the common law and not the statutory restrictions of an RICD. Clearly, this result is absurd and not what the court likely had in mind when attempting to redefine beneficial use. However, because the possibility to simply work around the court's restrictions exists, the argument against fishing as a beneficial use does not carry much weight.

Additionally, fishing has long been recognized at common law as a beneficial use in Colorado. In *Faden v. Hubbell*, the court recognized a flow-through water right for a fish hatchery.<sup>73</sup> While the majority in *St. Jude's Co.* differentiated *Faden* on other grounds,<sup>74</sup> it is important to note that a flow-through right in connection with fishing was found to be beneficial.<sup>75</sup> Again in 1992 the Colorado Supreme Court recognized that a water right could be appropriated on flowing water for recreational, fishery, or wildlife purposes.<sup>76</sup> In *City of Thornton v. City of Fort Collins*, the Colorado Supreme Court concluded that the City of Fort Collins' uses were "recreational, piscatorial, and wildlife uses, all valid under the [1969] Act."<sup>77</sup> Fort Collins had applied for those rights in conjunction with the diversion of water from its natural course into a new channel.<sup>78</sup> Importantly, the court in that case noted that, "[t]he exclusive authority vested in the CWCB [Colorado Water Conservation Board] to appropriate minimum stream flows does not detract from the right to divert and put to beneficial use unappropriated waters *by removal or control*."<sup>79</sup>

So even though the Colorado General Assembly later, and

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72. 830 P.2d 915, 919–20 (Colo. 1992).

73. 28 P.2d 248, 250–51 (Colo. 1933).

74. The majority took issue with how to quantify the results of a piscatorial use. See *infra* section I.D.5.

75. See *Faden*, 28 P.2d at 248–49.

76. *Fort Collins*, 830 P.2d at 930–31.

77. *Id.* at 931.

78. *Id.* at 919–20. The diversion actually returned water to the Poudre River's "original" channel. *Id.* at 920. The river had carved a new channel as the result of severe flooding several years prior. *Id.* The important distinction was that this was a diversion for "recreational, piscatorial, fishery, and wildlife purposes." *Id.* at 930–31.

79. *Id.* at 930 (emphasis added).

partly in response to the *Fort Collins* decision, passed the RICD statute,<sup>80</sup> the principle that an appropriator can claim a water right for a *diversion* (unlike an RICD where the water remains instream) remained good law, at least until the *St. Jude's Co.* decision. Therefore, it is telling that the legislature, when given the opportunity, chose to continue to allow these types of beneficial uses, so long as the water was diverted from the stream.

### 3. The Majority Opinion Improperly Construed “Use” as a Verb

The majority opinion made a point to note the definition of “use” and why aesthetic, recreational, and piscatorial uses do not qualify under that standard.<sup>81</sup> In particular, the majority cited a dictionary definition of “use” as “to put into action or service.”<sup>82</sup> The court then attempted to show why a use must be “active”<sup>83</sup> to meet that narrow dictionary definition. However, that is an inapt analysis because the Colorado Constitution does not require that water be “used” (a verb) but rather that it be put to “beneficial use” (a noun).<sup>84</sup> And if the court wants the definition of “beneficial use,” a dictionary is not required because the Colorado General Assembly defined the term at Colo. Rev. Stat. § 37-92-103(4).<sup>85</sup> Within that definition, case law has shown that “beneficial” is much more crucial to the validity of a water right than mere “use.”<sup>86</sup>

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80. See Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist., 109 P.3d 585, 599 (Colo. 2005) (internal citation omitted) (stating that the RICD statute “was enacted, at least in part, in response to fears that under *Fort Collins*, appropriators could obtain high recreational in-channel flows, severely hindering Colorado’s future development by either exporting or just tying up large amounts of water”).

81. *St. Jude's Co. v. Roaring Fork Club, L.L.C.*, 351 P.3d 442, 450 (Colo. 2015).

82. *Id.* (citing *Use*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

83. *Id.* at 450–51.

84. COLO. CONST. art. XVI, § 6; *St. Jude's Co.*, 351 P.3d at 458 (Márquez, J., dissenting in part and concurring in part).

85. COLO. REV. STAT. § 37-92-103(4) (2016) (“Beneficial use means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.” (internal quotation marks omitted)).

86. If we were only to look at whether or not the water was “used,” then someone just diverting the water and wasting it would qualify. However, it is now

To be clear, the issue is not that the majority used a dictionary to define terms in the statute—although it was unnecessary given that the statute already contains definitions. Rather, the problem is that the majority opinion took the time to analyze and define the term “use” as a verb, when the word only appears as the compound noun “beneficial use.” Therefore, whether the water is being “used” should not be a point of analysis for the court. The only inquiry that needs to be made is whether or not the water is being put to a *beneficial use*. As a result, the entire section of the opinion discussing the definition of “use” is unnecessary.

#### 4. The Court’s Decision to Distinguish Between “Active” and “Passive” Uses is Not Supported by Statute or Common Law

The court next attempted to make a distinction between “active” and “passive” uses of water.<sup>87</sup> For the reasons discussed above,<sup>88</sup> the *type* of use does not matter so long as it is beneficial. However, the court chose not to follow this rule, but instead used the *St. Jude’s Co.* situation to craft a new rule: that in order to be beneficial under Colo. Rev. Stat. § 37-92-103(4), the use of water must be “active.”<sup>89</sup> The court used several old cases to show that all prior beneficial uses in Colorado have been active.<sup>90</sup> Because the *only* thing that matters is whether the use is beneficial,<sup>91</sup> drawing a distinction between active and passive uses is completely arbitrary. Not only that, but it is an irrelevant distinction because the turning point is, and always has been, whether the use is beneficial.<sup>92</sup>

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clear that diversion is only a minor requirement, and that whether or not the use is *beneficial* actually makes a difference. See *Archuleta v. Gomez*, 200 P.3d 333, 343 (Colo. 2009) (“Diversion of water by itself cannot ripen into a water right if the water is not beneficially used.”).

87. *St. Jude’s Co.*, 351 P.3d at 450.

88. See *supra* section I.D.3.

89. *St. Jude’s Co.*, 351 P.3d at 450–51.

90. Throughout the history of water cases in Colorado, almost all of the uses could be defined as “active.” See, e.g., *Vance v. Wolfe*, 205 P.3d 1165, 1169 (Colo. 2009) (“Even the most innovative beneficial uses . . . involve . . . active use.”).

91. See *supra* section I.D.6.

92. See *St. Jude’s Co.*, 351 P.3d at 450; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (Colo. 1882) (“[T]he first appropriator of water from a natural stream for a *beneficial purpose* has . . . a prior right . . .” (emphasis added)); *Santa Fe Trail Ranches Prop. Owners Ass’n. v. Simpson*, 990 P.2d 46, 52 (Colo. 1882)

However, the court insisted that “the ‘uses’ delineated by the Club are entirely passive . . . amounting to ‘uses’ only in the sense that someone derives enjoyment from the water in its diverted state.”<sup>93</sup> The court then listed several prior “innovative” uses that are still more active than the Club’s aesthetic, recreational, and piscatorial uses.<sup>94</sup> Specifically, the court highlighted *Vance v. Wolfe*, where the Colorado Supreme Court found a beneficial use for the water used in the production of coalbed methane (CBM).<sup>95</sup> In that case, a group of ranchers argued that the use was “beneficial” and therefore would require the drilling company to appropriate a junior water right.<sup>96</sup> The court held that because CBM uses water “by extracting it from the ground and storing it in tanks . . . to ‘accomplish’ a particular ‘purpose’”—the release of methane gas—“[t]he extraction of water to facilitate CBM production is therefore a ‘beneficial use.’”<sup>97</sup> Additionally, the court went a step further by citing *Vance* in a parenthetical for the proposition that the decision “emphasiz[ed] that coalbed methane process[es] use[] a *particular quantity of water* as is necessary to release methane gas trapped by it.”<sup>98</sup> While CBM production clearly uses some quantity of water, nothing in that

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(“[B]eneficial use defines the genesis and maturation of every appropriative water right in this state.”).

93. *St. Jude’s Co.*, 351 P.3d at 450 (citation omitted).

94. *Id.*

95. *Id.* (citing *Vance v. Wolfe*, 205 P.3d at 1168 (“[T]he extraction of water for the purpose of CBM is a beneficial use . . .”). Coalbed methane natural gas (CBM) is naturally absorbed on the internal surface of coal and held in place by the pressure from groundwater. *Vance*, 205 P.3d at 1167. That pressure is relieved by drilling wells and removing the groundwater; the CBM then desorbs from the coal and is collected. *Id.* The removed water is collected on the surface and stored in tanks. *Id.* Later, that water is reinjected back into the ground. *Id.* More than 4,000 wells have been drilled into the deep coalbeds of the San Juan Basin in southern Colorado. *Id.*

96. *Id.* If the water used in CBM production was not considered a beneficial use, then the drilling companies did not have to apply for a water right. *Id.* This was important because if the drilling companies had to appropriate a water right, it would be a far junior right, especially as compared to the ranchers’. *Id.* Once the use was declared to be beneficial, the use of water in CBM production is now “subject to administration and permitting” by the State and Division Water Engineers, and the 1969 Act. *Id.* With that authority, the drilling companies are now no longer able to call for “out-of-priority diversions for CBM production with a well permit and, where necessary, a decree adjudicating an augmentation plan.” *Id.*

97. *Id.*

98. *St. Jude’s Co.*, 351 P.3d at 450 (citing *Vance*, 205 P.3d at 1169) (emphasis added).

section of *Vance* mentions, let alone emphasizes, that specific quantity, or why that amount is beneficial.<sup>99</sup> This stretches the actual holding in *Vance* in an attempt to further differentiate it from the facts in *St. Jude's Co.* and to draw an artificial line between active and passive uses of water.<sup>100</sup>

Because nothing in the statutes governing beneficial use, or the subsequent developments in the common law, uses an active or passive test to differentiate between beneficial and non-beneficial uses of water, there is no reason to institute such an arbitrary standard.

##### 5. It is Already Common Practice to Determine What Amount of Water is Reasonable, Appropriate, or Efficient

The majority opinion took issue with the fact that the necessary amount of water for appropriations under aesthetic, recreational, and piscatorial uses is often difficult to quantify.<sup>101</sup> The court noted the distinction that piscatorial uses *could* be limited to fish production, like in *Faden*, because the results of the piscatorial use in that case were easily quantifiable.<sup>102</sup> But, if “yielding measurable results”<sup>103</sup> was the only criteria for ensuring a piscatorial use was beneficial, then surely the Club’s financial records and fly fishing sales would be an objective<sup>104</sup> standard by which to measure its use.

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99. See *Vance*, 205 P.3d at 1169.

100. See generally *St. Jude's Co.*, 351 P.3d at 458 (Márquez, J., dissenting in part and concurring in part).

101. *Id.* at 451 (majority opinion).

102. *Id.*

103. *Id.*

104. Given the relative lack of water in Colorado, the court is rightly concerned with ensuring that water is not wasted, and that the use is as efficient as possible. See COLO. REV. STAT. § 37-92-103(4) (2016); *St. Jude's Co.*, 351 P.3d at 450 (“The Act’s emphasis on reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful.”); see also *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629, 635 (Colo. 1954) (stating that an appropriation “should be denied only in such instances as where it is impossible to impose reasonable” limits on the use). With that in mind, the court prefers objective standards with hard numbers, rather than “soft” standards that are merely experts’ opinions. However, the RICD statute is a perfect example of how hard numbers in the hands of an expert can be used to come up with reasonable amount of water usage. See COLO. REV. STAT. § 37-92-102 (defining beneficial use as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to

Instead, the court focused on the Club's creation of a "more challenging recreational fishing experience" as a subjective standard by which the reasonableness of a piscatorial water right could not be determined.<sup>105</sup>

By making this distinction, the court posited the idea that determining the amount of water that is reasonable, appropriate, efficient, etc., for a subjective experience is impossible.<sup>106</sup> However, the common law and statutes both contain examples of how that quantity of water can be determined. In *Colorado Water Conservation Board v. Upper Gunnison Water Conservancy District*, the court held that expert testimony could determine how much water was necessary for a "reasonable recreational experience" on that particular stream.<sup>107</sup> That meant the water court would "be required to weigh conflicting expert testimony given by course designers or other interested parties, and make a finding as to the least necessary stream flow to achieve an applicant's objectively reasonable recreation experience."<sup>108</sup>

In the constant struggle to efficiently use the water of the state,<sup>109</sup> the requirement that the court determine the *minimum* amount of water necessary for a reasonable recreation experience is important. That language effectively puts a check on the fears that appropriators would tie up massive amounts of stream water unnecessarily, thereby resulting in an overall inefficiency.<sup>110</sup> Because the plaintiffs in that case could show both that the appropriation was for a reasonable recreational experience, and that their application was for the minimum amount of water necessary to achieve

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accomplish without waste the purpose for which the appropriation is lawfully made."). A similar line of reasoning could be used here to turn quantifiable amounts of streamflow into a "reasonable recreational experience."

105. *St. Jude's Co.*, 351 P.3d at 451.

106. *Id.*

107. *Colo. Water Conservation Bd. v. Upper Gunnison Water Conservancy Dist.*, 109 P.3d 585, 602–03 (Colo. 2005). This case was one of the first to interpret Colorado's RICD statute. *Id.*

108. *Id.* at 603.

109. See WILKINSON, *supra* note 18, at 232–33 (showing that the development of prior appropriation law incentivized early users (often miners) to use *all* of the water in a stream).

110. *Upper Gunnison Water Conservancy Dist.*, 109 P.3d at 589 ("[A]ny appropriation in excess of the minimum stream flow for a reasonable recreational experience in and on the water does *not* put water to beneficial use." (emphasis added)).

that experience, the appropriation was valid under the RICD statute and the Colorado Constitution.<sup>111</sup>

Additionally, the Colorado RICD statute<sup>112</sup> itself states that municipalities can appropriate the amount of water necessary for a reasonable recreational experience.<sup>113</sup> Exactly what that means—and how much water it means for each appropriation—has been a highly controversial subject.<sup>114</sup> However, the important point is that it has been litigated. Regardless of the outcomes in any of those cases, the court has never taken issue with whether or not that amount can be determined. Therefore, it is already common practice to determine the reasonable, appropriate, and efficient amount of water necessary for recreational uses. It would have been fair for the court to rule that the Club never determined (or offered the necessary evidence for) what amount was necessary for aesthetic, recreational, and piscatorial uses. However, the court went too far in saying that reasonable amounts could never be determined for Roaring Fork’s uses.

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111. COLO. REV. STAT. § 37-92-102(5)–(6) (2016); COLO. CONST. art. XVI, § 6 (requiring that the water be put to beneficial use, in conjunction with the Colorado Supreme Court’s ruling that any excess appropriation is not a beneficial use).

112. COLO. REV. STAT. §§ 37-92-102(5)–(6), 37-92-103(4), (7), (10.3), 37-92-305(13)–(16) (originally passed as S.B. 01-216, 63d Gen. Assemb., Reg. Sess. (Colo. 2001)).

113. *Id.* § 37-92-305(13)(b) (asking “whether the intended recreational experience is reasonable”).

114. *See, e.g.*, Brent Gardner-Smith, *State Water Board Rules Against Glenwood’s Proposed Whitewater Rights*, ASPEN JOURNALISM (July 16, 2015), <http://aspensjournalism.org/2015/07/16/state-water-board-rules-against-glenwoods-proposed-whitewater-rights/> [<https://perma.cc/CNG3-EY3S>] (discussing the CWCB’s denial of the City of Glenwood Springs application for an RICD on the Colorado River). The city’s application for the water necessary to sustain three new whitewater parks was denied because the CWCB found that the RICD “would ‘impair Colorado’s ability to fully develop its compact entitlements’ and would not promote ‘the maximum beneficial use of water’ in the state.” *Id.* However, after the CWCB ruling, the case will now be heard in water court. *Id.* Multiple parties are supporting Glenwood Springs in that case, including Western Resource Advocates and American Whitewater. *Id.* Addressing the CWCB’s concerns, Nathan Fey, the Colorado stewardship director for American Whitewater said, “[i]t is unclear what evidence the staff presented that shows it is of material impairment to developing our water, or maximizing use of the state’s water . . . . Those are significant concerns, but I don’t think the state made a very strong case on those points.” *Id.*

6. Decrees Have Been Issued in Several Different Water Districts for Flow-Through Rights for Aesthetic, Recreational, and Piscatorial Uses

By holding that aesthetic, recreational, and piscatorial uses are not beneficial under Colorado law, the court went against the common law practice already in place throughout the state. Specifically, we can look at Water Divisions 3, 4, and 5 for examples of how these water rights are already working to promote the maximum utilization of the waters of Colorado. Water Division No. 3 (the Rio Grande River in south-central Colorado) has decreed flow-through rights for “recreation, piscatorial [uses], and fish and wildlife habitat.”<sup>115</sup> Water Division No. 4 (the Gunnison River on the Western Slope) has allowed appropriations for “piscatorial and recreational use in a trout fishery” and, very similar to the Club’s diversion, for a “Fishing Stream” and an “Amenity Stream.”<sup>116</sup> Finally, Water Division No. 5 (the main stem of the Colorado River) has issued decrees for “piscatorial, recreation, and fish and wildlife habitat enhancement purposes.”<sup>117</sup>

The fact that multiple water divisions across the state have already issued decrees for these uses shows it is already widely accepted across the state that aesthetic, recreational, and piscatorial diversions are clearly beneficial uses in Colorado. In addition to the statutory objections discussed above,<sup>118</sup> these current appropriations show that the court’s decision here was counter to the existing common law as well. While it is certainly within the court’s purview to overrule lower court decisions, the unanimous precedent supporting the three uses—combined with the negative effects that will result from this decision—confirm that aesthetic, recreational, and piscatorial flow-through diversions should remain beneficial uses.

## II. PROBLEMS RESULTING FROM THE *ST. JUDE’S CO.* DECISION

While much of the analysis of the decision is academic, its

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115. *St. Jude’s Co. v. Roaring Fork, L.L.C.*, 351 P.3d 442, 460 (Colo. 2015) (Márquez, J., dissenting in part and concurring in part).

116. *Id.*

117. *Id.*

118. *See supra* sections I.D.1–2.

effects will be felt throughout the state in practice. Because appropriations will no longer be allowed, both private development and environmental preservation will suffer. Additionally, while it is unknown if, or how many existing water rights for aesthetic, recreational, and piscatorial uses will be challenged, all current rights appropriated under those uses could be in jeopardy.

*A. No Further Rights Will Be Granted for Aesthetic, Recreational, or Piscatorial Uses*

Currently, no further water rights will be granted for aesthetic, recreational, or piscatorial uses.<sup>119</sup> This will affect the further development of Colorado's economy by limiting the types of development that can occur. Specifically, the state needs non-consumptive uses of water to generate further development. Additionally, private parties monitor their water rights much more closely than the state can monitor its ISF appropriations,<sup>120</sup> and therefore allowing appropriations for aesthetic, recreational, and piscatorial uses is important for environmental preservation.

1. Limiting Economic Development of Non-Consumptive Uses

Because almost all of the water in Colorado is already appropriated, non-consumptive uses of water are critical for future economic development. Under the Colorado River Compact, the "upper basin states"<sup>121</sup> are required to send 75

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119. *St. Jude's Co.*, 351 P.3d at 451 ("[T]he Club's asserted aesthetic, recreational, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act. It is for the General Assembly to approve such unconventional beneficial uses.").

120. With more than 1,600 ISFs and counting, there are simply too many for the CWCB to effectively monitor. In contrast, private parties usually have a small number of water rights—and their livelihood is tied to that right—so close monitoring is much more likely. See *Instream Flow Program*, COLO. WATER CONSERVATION BD., COLO. DEPT. OF NAT. RES., <http://cwcb.state.co.us/environment/instream-flow-program/Pages/main.aspx> (last visited Nov. 2, 2016) [<https://perma.cc/R4CJ-SW79>].

121. The "Upper Basin" states are Wyoming, Colorado, Utah, and New Mexico. *The Law of the River*, BUREAU OF RECLAMATION, U.S. DEPT. OF THE INTERIOR, <http://www.usbr.gov/lc/region/g1000/lawofrvr.html> (last updated Mar. 2008) [<https://perma.cc/5J78-WL6U>]. Conversely, the "Lower Basin" states are Arizona,

million acre-feet (maf)<sup>122</sup> of Colorado River water to the lower basin states every ten years.<sup>123</sup> This division of water was done on the presumption that there were at least 16.4 maf in the Colorado River annually; so the upper and lower basin states were each entitled to half, or 7.5 maf.<sup>124</sup> Within that 7.5 maf allotted to the Upper Basin, Colorado is entitled to 51.75 percent, or approximately 3.86 maf.<sup>125</sup> However, the exact amount of water in the Colorado River is now being called into question.<sup>126</sup> Some experts believe that Colorado still has water left to appropriate, but the general consensus is that the state is fully appropriated, or even over-appropriated.<sup>127</sup> Regardless of which report is accurate, it is generally agreed that Colorado must utilize non-consumptive uses in order to continue to grow its economy.<sup>128</sup>

To be sure, the Colorado River does not account for all of the water in the state. However, being the largest basin, it serves as a snapshot with which to analyze the water deficit throughout the state. If the waters of Colorado are over-appropriated, then appropriators are unlikely to get their

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Nevada, and California. *Id.*

122. An acre-foot is the amount of water necessary to cover an acre of land to a depth of one foot. BARTON H. THOMPSON, JR. ET AL., *supra* note 19, at 26–27. This is approximately 326,000 gallons of water, and in the U.S. it is accepted as the planned annual water usage of a suburban household. *What's an Acre-foot?*, WATER ED. FOUND., <http://www.watereducation.org/general-information/whats-acre-foot> (last visited Jan. 30, 2017) [<https://perma.cc/7ZYD-BG68>].

123. The Colorado River Compact was passed in 1922 to regulate how water from the Colorado River was distributed between the seven states that contain the Colorado itself or its tributaries. Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 16 (1966). The upper basin states were concerned that water development projects in the lower basin—including Hoover Dam—would deprive them of their ability to utilize the river's flows under prior appropriation. *Id.* Then Secretary of Commerce Herbert Hoover came up with the plan to divide the states into the upper and lower basin, with each basin having the right to develop and use 7.5 maf annually. *Id.*

124. Jeffrey Jacobs, *The Sustainability of Water Resources in the Colorado River Basin*, BRIDGE, Winter 2011, at 6, 10.

125. Meyers, *supra* note 123, at 31 n.119.

126. Jacobs, *supra* note 124, at 10 (“Long-term Colorado River mean flow calculated over hundreds of years is significantly less than the 15 MAF/yr figure based on 20th century flows recorded at Lees Ferry.”); WILKINSON, *supra* note 18, at 226 (“[T]he upper basin states had been inadvertently snookered.”).

127. WILKINSON, *supra* note 18, at 226–27.

128. *Nonconsumptive Needs (Environmental and Recreational)*, COLO. WATER CONSERVATION BD., COLO. DEPT. OF NAT. RES., <http://cwcb.state.co.us/environment/non-consumptive-needs/Pages/main.aspx> (last visited Nov. 2, 2016) [<https://perma.cc/72HW-RKV5>].

water in all but the wettest of years.<sup>129</sup> Therefore, the only way to ensure continued economic development in Colorado is through non-consumptive uses.<sup>130</sup> A hypothetical river situation illustrates how this works in practice.

The Sample River is completely appropriated to 120 percent of average streamflow levels. Any user wanting to develop a business that needs consumptive water rights (agricultural, industrial, etc.) would probably not be able to develop because of the uncertainty of getting his water. However, a businessman with a plan to develop a club (similar to Roaring Fork) with non-consumptive water uses—such as the aesthetic, recreational, or piscatorial uses in *St. Jude's Co.*—would be able to develop. In practice, the businessman would be able to take the water out of the river, put it to a beneficial, non-consumptive use, and then return it to the river where it would again be available to downstream senior users.<sup>131</sup> In that scenario, no senior water rights are harmed, but the opportunity exists for more development. That opportunity is taken away if aesthetic, recreational, and piscatorial uses are categorically excluded as beneficial.

Water-related recreation generates more than \$9 billion and 80,000 jobs annually in Colorado.<sup>132</sup> Fishing, water sports, and wildlife viewing alone account for more than \$3 million annually.<sup>133</sup> Much of this is on public waters, but a lot of this revenue is generated on private property such as the Club.<sup>134</sup>

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129. See THOMPSON, JR., ET AL., *supra* note 19, at 171.

130. See Jason Anthony Robison, *The Colorado River Revisited*, 88 U. COLO. L. REV. (2017) (forthcoming).

131. Full appropriation of a river does not necessarily mean that the stream is dewatered. This is a very important distinction. Full appropriation means that the entire flow of the river is appropriated, while dewatering is the literal running dry of the stream. Because of return flows (water that is used and then runs back into the stream) and the order of priority (seniors are often much further downstream than juniors), fully appropriated streams are rarely dewatered.

132. Sarah Tory, *Colorado River's Economy Worth \$9 Billion*, HIGH COUNTRY NEWS (Oct. 2, 2014), <http://www.hcn.org/articles/colorados-river-economy-worth-9-billion> [<https://perma.cc/WHF3-CQAA>].

133. *Id.*

134. Jason Blevins, *Colorado Emerging as a National Leader in Developing a Recreation-Based Economy*, DENVER POST (June 5, 2016), <http://www.denverpost.com/2016/06/05/after-languishing-at-the-political-kids-table-outdoor-recreation-emerges-as-a-key-driver-of-the-u-s-economy/> [<https://perma.cc/9YXY-GR97>] (“Soaring numbers of visitors are swelling public and private coffers.”). See, e.g., *About*, NORTH PARK ANGLERS FLY FISHING CLUB, [www.coloradoflyfishingclub.com/about/](http://www.coloradoflyfishingclub.com/about/) (last visited Nov. 3, 2016) [<https://perma.cc/4FBX-S3QF>].

Because there is a huge market for water-related recreation, continuing to develop this market is crucial for the continual growth of the Colorado economy. Since Colorado is almost—or already—out of water, non-consumptive development is the only way to grow that sector.

## 2. Private Non-Consumptive Uses are Critical for Environmental Preservation.

Private water rights holders are much better positioned than the state to monitor their water rights, and private non-consumptive uses are therefore critical for environmental preservation. The Colorado ISF program is unique among the western states in that the state, through the CWCB, must apply for the ISF water right; it is a junior right, and it can be challenged in court.<sup>135</sup> Currently, Colorado holds title to more than 1,600 ISF rights.<sup>136</sup> Many of the rights are small, and often they are in remote reaches of high mountain streams.<sup>137</sup> Consequently, it is extremely difficult for the CWCB to monitor all of the state's ISFs.<sup>138</sup> In fact, the 2015 Basin Implementation Plan for the Yampa/White/Green Basin found that many ISFs in the basins were being shorted, some by as much as 50 percent, and many others by more than 25 percent.<sup>139</sup> Some of the shortages can be attributed to overall water shortages in the basin and, as a junior right, the ISFs are consequently the first affected.<sup>140</sup> However, much of the basin has been at or near average snowpack levels (with the exception of 2012), and the ISFs being shorted therefore cannot

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135. COLO. REV. STAT. § 37-92-102(3) (2016).

136. COLO. WATER CONSERVATION BD., *supra* note 120.

137. George Sibley, *Right to Remain: Non-consumptive Water Rights Pose a Worthwhile Administrative Challenge*, COLO. FOUND. FOR WATER EDUC. (2009), <https://www.yourwatercolorado.org/headwaters-archive-template/78-headwaters-magazine/headwaters-summer-2009/128-right-to-remain-non-consumptive-water-rights-pose-a-worthwhile-administrative-challenge> [https://perma.cc/C96G-ZQXV].

138. *Id.* (“One problem is an inadequate number of stream measuring gauges.”); Jack Sterne, *Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 217 (1997) (“[A]gencies may not have the staff, the time, or the inclination to monitor instream rights and complain whenever they are violated.”).

139. AMEC & HYDROS CONSULTING, YAMPA/WHITE/GREEN BASIN IMPLEMENTATION PLAN, at E-2 to -3 (2015), [https://www.colorado.gov/pacific/sites/default/files/Yampa-WhiteBIP\\_Full.pdf](https://www.colorado.gov/pacific/sites/default/files/Yampa-WhiteBIP_Full.pdf) [https://perma.cc/R8CJ-RMT7].

140. *Id.*

simply be explained by the weather.<sup>141</sup> That means the most likely explanation is that other water users are taking more than their decree amounts.

Theoretically, the state should monitor its ISFs.<sup>142</sup> However, this is much easier said than done. Because Colorado holds so many ISFs and has relatively little monitoring or manpower,<sup>143</sup> it is simply impossible for the CWCB to ensure that every ISF is getting its decreed water right. With no one to monitor the state ISFs, it becomes easy for other water users to take slightly more than their right, even if unintentionally.<sup>144</sup> This is especially true for smaller ISFs, which make up the majority of the state's appropriations.<sup>145</sup> When this is compounded, the result is that the ISF—and consequently the natural environment it was appropriated to protect—suffer.

This will eventually lead to several detrimental consequences because ISFs are crucial to the protection of the natural environment, as well as the economic development, of Colorado water.<sup>146</sup> ISFs are appropriated by the state for a number of reasons: waterfowl habitat, preservation of threatened and endangered fish habitat, riparian vegetation, and glacial ponds.<sup>147</sup> This unique system provides legal protection for the natural environment through a permanent, fully adjudicated water right.<sup>148</sup> These rights protect flow-through on a defined reach of stream, not just at a bypass point,<sup>149</sup> and have legal standing in water court to protect

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141. *Colorado Historical Snowpack Percentages by Watershed*, NAT. RES. CONSERVATION SERV. COLO., U.S. DEP'T AGRIC., [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/co/snow/products/?cid=nrcs144p2\\_063325](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/co/snow/products/?cid=nrcs144p2_063325) [https://perma.cc/G9WD-3ABZ].

142. *Monitoring and Enforcement*, COLO. WATER CONSERVATION BD., COLO. DEP'T NAT. RES., <http://cwcb.state.co.us/environment/instream-flow-program/Pages/MonitoringEnforcement.aspx> [https://perma.cc/4YLH-S29E].

143. CWCB staff actively monitors ISFs at only 70 stream gauges. *See id.*

144. *See Sterne, supra* note 138, at 217–19.

145. *See 2016 Proposed Instream Flow and Natural Lake Level Appropriations*, COLO. WATER CONSERVATION BD., COLO. DEP'T NAT. RES., <http://cwcb.state.co.us/technical-resources/instream-flow-water-rights-database/pages/main.aspx> (last updated Feb. 1, 2016) [https://perma.cc/4FZP-QK6R].

146. Sibley, *supra* note 137 (“Water today is at least as valuable economically in the river as it is out of it.”).

147. COLO. WATER CONSERVATION BD., *supra* note 120.

148. DAN MERRIMAN & ANNE M. JANICKI, *COLORADO'S INSTREAM FLOW PROGRAM – HOW IT WORKS AND WHY IT'S GOOD FOR COLORADO* 5 (2005), <http://cwcb.state.co.us/environment/instream-flow-program/documents/whyisfprogramworksgoodforcopdf.pdf> [https://perma.cc/DL9J-TK7C].

149. Most water rights ensure a specific amount of a water at a certain point

against injury at any point within that instream flow reach.<sup>150</sup>

So what can be done to better protect ISFs? One solution would be to allow private citizens to appropriate water rights for aesthetic, recreational, and piscatorial uses. All of these uses leave water in the stream, thereby “preserv[ing] the natural environment to a reasonable degree.”<sup>151</sup> Because private users more effectively monitor their water rights, these appropriations are much less likely to be shorted than ISFs.<sup>152</sup> And if the right is shorted, private parties are much more likely to notice, and therefore file a complaint with the Water Engineer and remedy the shortage.<sup>153</sup> Consequently, allowing private parties to appropriate water for aesthetic, recreational, and piscatorial uses would augment the state’s ISF program and help to preserve the natural environment for all Colorado citizens.

*B. Status of Current Appropriations Based on the Beneficial Use of Water for Aesthetic, Recreational, or Piscatorial Purposes*

The court’s opinion in *St. Jude’s Co.* could potentially be stretched and read to say that it is possible to prove beneficial use from aesthetic, recreational, and piscatorial uses, and that the Club was just unable to do so.<sup>154</sup> While this is probably a reach,<sup>155</sup> what could a future applicant do differently than the Club to ensure that its appropriation of water for an aesthetic, recreational, or piscatorial use was beneficial? If an existing water right was now challenged on the basis of its aesthetic,

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(e.g., the owner’s headgate). *Id.*

150. *Id.*

151. COLO. REV. STAT. § 37-92-102(3) (2016).

152. See Sterne, *supra* note 138, at 218.

153. *Id.*

154. *St. Jude’s Co. v. Roaring Fork, L.L.C.*, 351 P.3d 442, 451 (Colo. 2015) (“Without describing a purpose for the accomplishment of which a measureable 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.”).

155. *Id.* at 450 (“There is not, and clearly could not be, any suggestion that the Club’s practice in this regard is one of the three applications specifically authorized as beneficial uses.”). However, as discussed above, *supra* section I.D.1, the statute clearly does not limit beneficial uses to the three specifically mentioned in C.R.S. section 37-92-103(4).

recreational, or piscatorial use for not being beneficial,<sup>156</sup> the owner would need to show that the water was being put to a distinguishable purpose and that the water would be efficiently used and not wasted.<sup>157</sup>

First, the court made it clear that it wants the water to be put to a distinguishable purpose.<sup>158</sup> The court took issue with the Club's uses because "beauty, excitement, or fun cannot even conceptually be qualified."<sup>159</sup> The court then mentioned that the legislature has provided for how RICDs can be quantified but for some reason failed to extend these quantifiable, scientific measurements to the Club's uses.<sup>160</sup> Therefore, if a water rights owner with appropriations for aesthetic, recreational, or piscatorial uses had enough scientific research to quantify the amount of water needed to satisfy its uses, perhaps the court would be more willing to find a beneficial use.

Along that same line of thought, the court was worried that because aesthetic, recreational, and piscatorial uses cannot be quantified, those appropriations will result in the wasteful use of water.<sup>161</sup> The same expert testimony that proves how much water is necessary for the "reasonable recreational experience" could then be used, like in the case of RICDs, to determine the minimum amount necessary and thereby prevent waste. RICDs must function in such a way as to "promote maximum utilization of the waters of the state."<sup>162</sup> The court seemed to hold that, among other reasons, aesthetic, recreational, and piscatorial uses are not beneficial because they would not achieve this standard.<sup>163</sup> However, because the

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156. *See supra*, section II.B.1.

157. *St. Jude's Co.*, 351 P.3d at 449 ("[T]his definition echoes the terminological usage of the constitution, by implicitly distinguishing a 'purpose,' as the end for which the water is used; a 'use,' as an application of water toward a given purpose and the means to that end; and a 'beneficial use,' as that use which is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is made.") (quoting COLO. REV. STAT. § 37-92-103(4)).

158. *Id.*

159. *Id.* at 451.

160. *Id.*

161. *Id.* at 450 ("The Act's emphasis on reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful.")

162. COLO. REV. STAT. § 37-92-102(6)(b)(V).

163. *See St. Jude's Co.*, 351 P.3d at 450–51.

waters of Colorado may already be over-appropriated,<sup>164</sup> these non-consumptive uses are in fact the *best* way to maximize utilization of the waters of the state. If the all of the water that was appropriated was the minimum amount necessary for a reasonable recreational experience, this could help allay the court's fears of inefficiency and waste.

### 1. All Current Appropriations May Now be Awaiting Challenge

Notwithstanding the possibility that a water rights owner could still prove an aesthetic, recreational, or piscatorial appropriation,<sup>165</sup> it seems likely that all such appropriations are now in jeopardy. In theory, any of these water rights could now be challenged in water court, and it is likely that the water rights owners would lose and thereby forfeit their right. To clarify, no current water rights owners automatically forfeit their rights as a result of the *St. Jude's Co.* decision.<sup>166</sup> However, it is likely that if those rights were challenged on the basis of beneficial use, the water court would follow the *St. Jude's Co.* precedent and fail to find those uses as beneficial.

The loss of a water right for these private businesses will not only limit the future growth of Colorado's economy but, if the water rights are forfeited, will also have a negative effect on the current economy. There are dozens of fly fishing ranches throughout the state, in addition to countless other resorts and retreats that use water for aesthetic and recreational purposes.<sup>167</sup> Many of the clients that visit these ranches and resorts come from out of state; the forfeiture of their water rights could result in the ranches and resorts failing, which would in turn result in the loss of tourism dollars upon which that the Colorado economy is so dependent.<sup>168</sup> Therefore, not

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164. See *supra* section I.A.1.

165. See *supra* section II.B.1.

166. See *generally* COLO. REV. STAT. § 37-92-503 (listing the specific circumstances under which a water right is forfeited in Colorado). A change in the definition of beneficial use is not on that highly restrictive list.

167. FISHINGRANCHES.COM, <http://www.fishingranches.com> (last visited Apr. 2016) [<https://perma.cc/TX3K-WFFB>].

168. Jason Blevins, *Colorado Tourism Numbers Set Record in 2014*, DENVER POST: BUSINESS (June 23, 2015), <http://www.denverpost.com/2015/06/23/colorado-tourism-numbers-set-record-in-2014/> (last updated Apr. 24, 2016) [<https://perma.cc/SDM5-2LFV>] ("A record 71.3 million visitors spent \$18.6 billion

only does the categorical exclusion of aesthetic, recreational, and piscatorial uses as beneficial limit the growth of Colorado's economy in the future, it could also have a detrimental effect on current tourism opportunities.

In sum, the *St. Jude's Co.* decision was incorrect to categorically exclude aesthetic, recreational, and piscatorial uses as beneficial. Both the statute and relevant case law indicate that the three uses are well within the established bounds of beneficial use. Excluding these three uses threatens current appropriations, hinders further non-consumptive use development, and removes the possibility of private water rights preserving the environment as pseudo-ISFs.

### III. SOLUTION

So what can be done to remedy the potential issues created by the categorical exclusion of aesthetic, recreational, and piscatorial uses as beneficial? The longest-lasting solution would be to amend the beneficial use definition to allow flow-through appropriations for aesthetic, recreational, and piscatorial uses. In fact, this is the "solution" that has been suggested by the Colorado Supreme Court.<sup>169</sup> The court said, "[i]t is for the General Assembly to approve such unconventional beneficial uses, as it has done with its instream and RICD provisions."<sup>170</sup> Essentially, the court acknowledged that, if the people of Colorado want aesthetic, recreational, and piscatorial uses to be valid as beneficial, then they (through the Colorado General Assembly) can make that change.<sup>171</sup> The court also cited *People v. Emmert* as further reinforcing this point: "[i]f the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end."<sup>172</sup> Amending

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in Colorado in 2014.").

169. *St. Jude's Co. v. Roaring Fork, L.L.C.*, 351 P.3d 442, 451 (Colo. 2015).

170. *Id.*

171. *See In re Bd. Of Cty. Comm'rs of Arapahoe v. United States*, 891 P.2d 952, 972 (Colo. 1995) ("We have consistently recognized that the General Assembly has acted to preserve the natural environment by giving authority to the Colorado Water Conservation Board to appropriate water to maintain the natural environment, and we will not intrude into an area where legislative prerogative governs.").

172. *St. Jude's Co.*, 351 P.3d at 451 (citing *People v. Emmert*, 597 P.2d 1025, 1029 (Colo. 1979)).

the beneficial use definition would help to clear up the current ambiguity surrounding the term, while also allowing the legislature to set whatever limits it deems necessary for aesthetic, recreational, and piscatorial uses.

But the pressing issue here is what would those limits be, and how could they be set in such a way that would “promote maximum utilization of the waters of the state”?<sup>173</sup> Setting these boundaries ensures that only the minimum amount necessary is appropriated and that the water is used efficiently with minimal waste. Because there is a statutory mandate to “promote maximum utilization of the waters of the state,”<sup>174</sup> appropriations that benefit only a very small number of people while hurting the population as a whole should be avoided.

One potential cap could be the imposition of a flow rate limit on appropriations for aesthetic, recreational, and piscatorial uses (e.g., the maximum appropriation for a piscatorial use is 20 cfs). For piscatorial uses, this would be problematic because the habitat in which trout (the main sport fish in Colorado) can live is remarkably diverse.<sup>175</sup> That means that a tiny stream with a flow rate of 6 cfs and the main stem of the Colorado—with flows of over 20,000 cfs<sup>176</sup>—could both provide a reasonable recreational experience. Essentially, this would be a limitless “limit,” and therefore unworkable. Even the staunchest defenders of piscatorial use could not support an appropriation of hundreds of cfs on a major river for trout fishing. Similarly, both tiny streams and mighty rivers have aesthetic value, so it would be hard—if not impossible—to set a limit for aesthetic appropriations. Private recreational uses, however, could be subject to a “reasonable recreational experience” limit—just like their counterpart RICDs—although this would only work if “recreation” was limited to whitewater,

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173. COLO. REV. STAT. § 37-92-102(6)(b)(V).

174. *Id.*

175. See PAULINE ADAMS, CHRISTOPHER JAMES & CLAY SPEAS, BROWN TROUT (*SALMO TRUTTA*) SPECIES AND CONSERVATION ASSESSMENT PREPARED FOR THE GRAND MESA, UNCOMPAHGRE, AND GUNNISON NATIONAL FORESTS (2008), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5199817.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5199817.pdf) [<https://perma.cc/4GR9-A6GS>] (describing the various habitat requirements—including stream gradient, water temperature, and pool depth for spawning—for brown trout).

176. *Colorado Stream Flow Guide with Colorado River Flow and Colorado River Level*, ALLABOUTRIVERS.COM, [http://stream-flow.allaboutrivers.com/Colorado/river\\_flow-sCO.html](http://stream-flow.allaboutrivers.com/Colorado/river_flow-sCO.html) (last visited Mar. 2016) [<https://perma.cc/VMR9-9HDP>].

a clearly erroneous assumption.

Perhaps flow-through diversions could be limited only to certain uses, then, but only ones that are measureable and quantifiable. As it stands, the Colorado Supreme Court would simply say that those appropriations are limited to beneficial uses, of which aesthetic, recreational, and piscatorial do not qualify.<sup>177</sup> However, for the reasons discussed above,<sup>178</sup> recreational and piscatorial uses are beneficial at the very least. Because the court expressed a concern that the use be measureable,<sup>179</sup> allowing recreational and piscatorial but not aesthetic use could be a good compromise.

From a policy standpoint, one of the main reasons to not allow these flow-through diversions for aesthetic, recreational, and piscatorial uses is that the waters of the state are held in trust for the people of Colorado, and allowing these appropriations—where the water will only be used by those wealthy enough to afford the expensive private clubs and resorts—is therefore counter to the Colorado Constitution.<sup>180</sup> However, even though the Colorado Constitution says that the waters are held in trust for the people of Colorado, that is only the case until it is appropriated.<sup>181</sup> But it does seem to be poor public policy to allow only the upper class to be able to take advantage of the state's tremendous natural resources. However, if we do not allow these uses, then that water could be appropriated by agriculture or municipalities with the same result. To clarify, while it may be more “agreeable” to the public if a common farmer has a water right rather than a multimillionaire, the end result—that the general public cannot personally benefit from the water—is the same. So even though we may prefer the rancher to the real estate mogul on an emotional level, the final outcome is identical, and the law should reflect that reality.

With that in mind, the best solution would be to allow for flow-through diversions for aesthetic, recreational, and piscatorial uses, but only so long as that same use is not

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177. *St. Jude's Co. v. Roaring Fork, L.L.C.*, 351 P.3d 442, 450 (Colo. 2015).

178. *See supra* section I.D.4.

179. *St. Jude's Co.*, 351 P.3d at 451.

180. COLO. CONST. art. XVI, § 5 (“The water of every natural stream . . . is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state.”).

181. *Id.* § 6 (“The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.”).

materially injured in the reach of stream parallel to the flow-through diversion. Essentially, this would pair a private flow-through diversion with a corresponding ISF. The minimum required flow on the original reach would be based on the character and nature of the stream. A mix of qualitative and quantitative analysis would provide sufficient flexibility to determine the reasonable flowrate necessary to preserve the qualities of the original stream.

So if a private club wished to build a ditch on their property and appropriate a flow-through diversion for piscatorial uses, they would be allowed to do so, so long as the piscatorial uses of the original reach of the stream were not materially impaired. To ensure that the water left in the original stream would not be later appropriated (by agriculture or municipalities), the state would claim an ISF in an amount necessary to sustain piscatorial uses on the reach of the original stream that flows parallel to the private party's flow-through diversion. The public would not benefit directly from the ISF in the specific reach of the stream (because most of these diversions will likely occur on private property anyway), however, ensuring the protection of that reach of the stream works to protect all downstream waters to which the public may have access. If there was only enough water in the stream to support the flow-through right—and not a corresponding ISF—then the appropriation would be denied because it would not “promote maximum utilization of the waters of the state.”<sup>182</sup> While this would preclude development, it would do so on a much smaller scale than simply categorically excluding aesthetic, recreational, and piscatorial uses as the court has chosen to do in *St. Jude's Co.* In fact, allowing these uses—even in a mildly restricted fashion as proposed here—creates *more* economic development by promoting nonconsumptive uses.

The best way to accomplish this would be to amend C.R.S. section 37-92-103(4), with a cross-reference to C.R.S. section 37-92-102(3). The language would look something like this (new language in bold):

(4) “Beneficial use” means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose

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182. COLO. REV. STAT. § 37-92-102(6)(b)(V).

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for which the appropriation is lawfully made. Without limiting the generality of the previous sentence, “beneficial use” includes:

...

**(d) The diversion of water for a flow-through feature for aesthetic, recreational, or piscatorial purposes. This use will be valid only if:**

**(i) The application is accompanied by an instream flow application from the CWCB to preserve the specified use in the corresponding reach of the original stream, as contemplated in section 37-92-102(3); and**

**(ii) That instream flow will not be materially damaged by the applicant’s proposed flow-through diversion for aesthetic, recreational, or piscatorial purposes;**

**(iii) For this section only, “materially damaged” means that the People of Colorado can no longer enjoy a reasonable recreational experience on that reach of the original stream, for the same purpose as the flow-through diversion.**

The opposition to this plan would use the same arguments already made against ISFs: that they tie up water and limit development.<sup>183</sup> However, these ISFs would both allow for development parallel to the specified reach and preserve the water for downstream development. This would act as a check on aesthetic, recreational, and piscatorial diversions because the water right owner would be able to appropriate water up to the amount that does not hurt the corresponding use in the original stream reach.

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183. *But see* Lawrence Myers, Comment, *To Have Our Water and Use it Too: Why Colorado Water Law Needs a Public Interest Standard*, 87 U. COLO. L. REV. 1041 (2016) (showing that the reservation of instream flows doesn’t limit economic development, but rather promotes it).

## CONCLUSION

The Colorado Supreme Court erred in *St. Jude's Co. v. Roaring Fork, L.L.C.*, by categorically excluding aesthetic, recreational, and piscatorial uses as beneficial under Colorado water law. Both the statutory and common law history suggest that the three uses are, have been, and should be valid as beneficial uses in Colorado. As it currently stands, all water rights owners with appropriations based on aesthetic, recreational, and piscatorial uses are in jeopardy of losing their water when challenged. This could have extremely detrimental consequences for the current Colorado water-based recreation economy and could severely hinder future nonconsumptive use development. There is a slight possibility that this decision could be challenged by a water rights owner who uses a dam to control and divert the water into his own channel, however this is a long shot.<sup>184</sup> The most practical and long-lasting solution would be to amend the language of C.R.S. section 37-92-103(4).<sup>185</sup> By allowing private properties to divert water for aesthetic, recreational, and piscatorial purposes but also creating a corresponding ISF in the original stream reach, we will be able to find the common ground between parties and maximize the utility of the waters of Colorado.

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184. See *supra* section I.D.2.

185. See *supra* Part III.