



**Written Instruction 2016-01 (Amended on July 13, 2017)
Instruction for Implementation of St. Jude's Ruling and House Bill 17-1190
into DWR's Administrative and Consultation Duties**

1.0 INTRODUCTION

The State Engineer may issue written instructions and orders to the Division Engineers regarding the administration of water rights. The State Engineer may also promulgate rules to establish administration practices, but such rules are not required for administration.

This Written Instruction directs the Division Engineers concerning the administration of water rights and their water court consultation duties to ensure consistent and equitable administration and water court consultation that is also consistent with Colorado water law and applicable court decrees. This Written Instruction reflects the State Engineer's direction as the Director of the Colorado Division of Water Resources in light of the Supreme Court's ruling in *St. Jude's Co. and Reno Cerise v. Roaring Fork Club, LLC, et al.*, 2015 CO 51, 351 P.3d 442 (2015) ("*St. Jude's*"). This Written Instruction, originally issued by the State Engineer on July 6, 2016, is amended on July 13, 2017 to also acknowledge the General Assembly's direction to the water court as codified in House Bill 17-1190. It does not reflect or identify the views of any State department, division, board, or entity of State government other than the Division of Water Resources.

2.0 AUTHORITY

This Written Instruction is issued pursuant to section 37-92-501, C.R.S.

3.0 BACKGROUND

In *St. Jude's*, the Roaring Fork Club, the owner of a private golf, fishing, recreational, and residential resort located near the town of Basalt, filed a water court application for new appropriative rights and a change in the point of diversion for an existing right. As to the new rights, the Club asserted it had diverted 21 c.f.s. from the Roaring Fork River into the RFC Ditch, which is a flow-through structure located entirely on Club land that returns water to the Roaring Fork River approximately one half-mile downstream from its point of diversion. The application indicated the Club used the water in question and the RFC Ditch itself as an "aesthetic and recreational amenity to a golf course development, as well as for fish habitat and as a private fly-fishing stream." The Club sought a decree for 21 c.f.s. for "aesthetic, recreation, and piscatorial uses," which the water court entered.



The Supreme Court reversed the water court and found the “Club’s diversion of the water in question for its stated purposes simply fails to meet the statutory requirements for an appropriation - the ‘application of a specified portion of the waters of the state to beneficial use.’” “While the 1969 Act does not define the term ‘use,’ the act of putting, or applying, a portion of the waters of the state to beneficial use clearly contemplates more than simply diverting it from the natural stream.” The Court found that the “uses” delineated by the Club are entirely passive and even “the most innovative beneficial uses approved under the Act’s general definition involve more active use than found here.” The Court held that the Club’s proposed “uses” cannot be beneficial within the meaning of the Act “because the only purpose they are offered to serve is the subjective enjoyment of the Club’s private guests.” In “order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful.” “The flow of water necessary to efficiently produce beauty, excitement, or fun cannot even be conceptually quantified, and therefore where these kinds of subjective experiences are recognized by the legislature to be valuable, it has specifically provided for their public enjoyment, scientific administration, and careful measurement.”

The Court also found that, “[i]n effect, the Club seeks to accomplish by virtue of diversion what the legislature has expressly prohibited instream: By using a diversion to effectively change the path of a natural stream or a significant portion of it, the Club seeks approval for re-creating a natural stream on its private property and adjudicating the rights to enjoy the flows therein.” “This appropriation is tantamount to a ‘forbidden riparian right.’” “For these reasons, the Club’s asserted aesthetic, recreation, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act.” The Court distinguished the Club’s asserted “piscatorial” use from the beneficial use of water in hatcheries for fish culture, where appropriators use water “for fish production, yielding measureable results and thus implying objective limits to reasonable use of water.” The “Club’s asserted ‘piscatorial’ use entails the application of water for a more challenging recreational fishing experience or, in other words, subjective enjoyment of its guests.”

The Court’s mandate making its ruling final was issued on July 15, 2015. In August and December of 2015, Division Engineers were faced with either rulings of a water referee or new water court applications that raised potential concerns in light of the *St. Jude’s* ruling. These cases triggered questions as to how the Division Engineers should implement the *St. Jude’s* ruling when carrying out their administrative and water court consultation duties. This instruction addresses the questions that have arisen to date and is premised on the decision by the State Engineer that, absent further guidance from the courts or the General Assembly, the *St. Jude’s* ruling should be viewed in light of the facts before the Supreme Court and applied by the Division Engineers to claims for direct flow water rights for aesthetic, recreation, and piscatorial uses for the purpose of re-creating a natural stream on private property.

This Written Instruction, originally issued on July 6, 2016, addressed two distinct areas potentially affected by the Supreme Court’s ruling: administrative actions

regarding water rights for which a decree was already entered and regarding water rights for which a decree was to be entered in the future. On May 25, 2017, the Governor signed House Bill 17-1190, which adds Section 37-92-305(20), C.R.S. and gives clear direction that the provisions of the *St. Jude's* ruling do not apply to water rights for which a decree was entered on or before July 15, 2015, except if a change other than to the points of diversion is requested. This Written Instruction has been amended to comply with the General Assembly's direction for those water rights.

The General Assembly did not address the applicability of the *St. Jude's* ruling to water rights for which a decree was entered after July 15, 2015. Importantly, the General Assembly selectively amended the introduced bill to eliminate any reference to the applicability of the *St. Jude's* ruling to water rights entered after July 15, 2015.

4.0 INSTRUCTION

In carrying out their administrative and water court consultation duties, the Division Engineers should implement the *St. Jude's* ruling, as clarified by House Bill 17-1190, as follows:

- (1) For any water court applications for new tributary or nontributary surface or ground water rights or for new changes of any water rights originally decreed before July 15, 2015, where the Applicant seeks a change other than a change in the point of diversion, the Division Engineers' consultations with the water referees should recommend that any claims for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property should be denied. The Division Engineers should then, generally, leave these claims for the parties and the court to resolve, but the Division Engineers may participate as to other issues or claims raised by such applications. The Division Engineers need not file statements of opposition, motions to intervene, or protests regarding such claims, but will reserve their right and ability to do so on a case-by-case basis in consultation with the State Engineer.
- (2) As to any absolute or conditional water rights for which a decree was first entered after July 15, 2015, for any application for changes of such water rights, findings of reasonable diligence, to make such conditional water rights absolute, or for the approval of a plan for augmentation including such rights, the Division Engineers' consultations with the water referees should recommend that any claims for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property should be denied. The Division Engineers should then, generally, leave these claims for the parties and the court to resolve, but the Division Engineers may participate as to other issues or claims raised by such applications. The Division Engineers need not file statements of opposition, motions to intervene, or protests regarding such claims, but will reserve their right and ability to do so on a

case-by-case basis in consultation with the State Engineer. This paragraph applies to all types of change of water right water court applications under sections 37-92-302 and 37-92-305, C.R.S.

- (3) As to any absolute or conditional water rights for which a decree was entered before July 15, 2015, which would be subject to the *St. Jude's* ruling but for section 37-92-305(20), C.R.S., for subsequent applications for findings of reasonable diligence, to make such conditional water rights absolute, for approval of augmentation plans related to such rights, or to only change the points of diversion for such rights, the Division Engineers' consultations shall recognize the rights are valid and may be maintained in accordance with Colorado law.
- (4) The State and Division Engineers should administer existing absolute and conditional decrees as well as augmentation plans as presently decreed, even if they include recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property. The State Engineer's office should not issue tributary or nontributary well permits for such uses for the purpose of re-creating a natural stream on private property.
- (5) As to aesthetic, recreation, and piscatorial uses in other contexts, especially the public/municipal context, the Supreme Court did not address this issue in *St. Jude's*. The General assembly provided no further clarification on such uses through House Bill 17-1190. Accordingly, unless instructed otherwise by the State Engineer, the Division Engineers should not express any position at this time as to whether the *St. Jude's* ruling applies or may apply to public or private storage right claims that include aesthetic use in ponds or reservoirs or to public/municipal direct flow claims for aesthetic, recreation, and piscatorial uses. If consulted further by the Water Referee about the applicability of the *St. Jude's* rulings to such claims, the Division Engineer should share the State Engineer's understanding that the Supreme Court did not address this issue in the *St. Jude's* ruling but affirm that every applicant bears the burden of proof to show 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. The Division Engineers should also provide notice of such claims to the State Engineer, the Colorado Water Conservation Board, and any other State department, division, board, or agency that requests such notice.
- (6) For any water court applications for absolute or conditional storage rights that seek the right to release the stored water for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property, the Division Engineers' consultations should recommend denial of claims for such uses of released water.

- (7) Because the applicability of the *St. Jude's* ruling to other contexts is unclear to the State Engineer, for sand and gravel pits that expose groundwater, the Supreme Court's decisions in the *Zigan* and *Three Bells* cases should continue to control, and their owners or operators may obtain well permits for aesthetic, recreation and piscatorial uses because these uses in such pits are not for the purpose of re-creating a natural stream on private property. The State and Division Engineers should also not recommend denial of water court claims for aesthetic, recreation and piscatorial uses for excavations or pond wells that expose groundwater to the atmosphere because such uses in such structures are not for the purpose of re-creating a natural stream on private property.
- (8) For water court applications involving claims for direct-flow freshening flow water rights to serve ponds, reservoirs, or excavations or pond wells exposing groundwater to the atmosphere, the extent to which *St. Jude's* should apply, if at all, is not clear to the State Engineer. Accordingly, unless instructed otherwise by the State Engineer, the Division Engineers' consultations should not object to such water rights, but should request that the applicant prove up efficient rates to accomplish the purpose without waste. The Division Engineers should then, generally, leave these claims for the parties and the court to resolve. The Division Engineers need not file statements of opposition, motions to intervene, or protests regarding such claims, but will reserve their right and ability to do so on a case-by-case basis in consultation with the State Engineer.

This Written Instruction is subject to revision by the State Engineer at any time. The staff of the State Engineer's office and the Division Engineers shall retain their full discretion to consider each water court case or well permit application based on its own facts and circumstances and may depart from this Written Instruction with the approval of the State Engineer. This Written Instruction is not intended to establish any rule or policy to be relied upon by any person or party outside of the Colorado Division of Water Resources in any administrative or judicial proceeding.

Approved by:



Kevin G. Rein, Director/State Engineer

Date: July 13, 2017



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Division of Water Resources
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Instruction for Implementation of St. Jude's Ruling
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The Supreme Court reversed the water court and found the “Club’s diversion of the water in question for its stated purposes simply fails to meet the statutory requirements for an appropriation - the ‘application of a specified portion of the waters of the state to beneficial use.’” “While the 1969 Act does not define the term ‘use,’ the act of putting, or applying, a portion of the waters of the state to beneficial use clearly contemplates more than simply diverting it from the natural stream.” The Court found that the “uses” delineated by the Club are entirely passive and even “the most innovative beneficial uses approved under the Act’s general definition involve more active use than found here.” The Court held that the Club’s proposed “uses” cannot be beneficial within the meaning of the Act “because the only purpose they are offered to serve is the subjective enjoyment of the Club’s private guests.” In “order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful.” “The flow of water necessary to efficiently produce beauty, excitement, or fun cannot even be conceptually quantified, and therefore where these kinds of subjective experiences are recognized by the legislature to be valuable, it has specifically provided for their public enjoyment, scientific administration, and careful measurement.”

The Court also found that, “[i]n effect, the Club seeks to accomplish by virtue of diversion what the legislature has expressly prohibited instream: By using a diversion to effectively change the path of a natural stream or a significant portion of it, the Club seeks approval for re-creating a natural stream on its private property and adjudicating the rights to enjoy the flows therein.” “This appropriation is tantamount to a ‘forbidden riparian right.’” “For these reasons, the Club’s asserted aesthetic, recreation, and piscatorial uses, even when proven as alleged, do not qualify as beneficial uses under the 1969 Act.” The Court distinguished the Club’s asserted “piscatorial” use from the beneficial use of water in hatcheries for fish culture, where appropriators use water “for fish production, yielding measureable results and thus implying objective limits to reasonable use of water.” The “Club’s asserted ‘piscatorial’ use entails the application of water for a more challenging recreational fishing experience or, in other words, subjective enjoyment of its guests.”

The Court’s mandate making its ruling final was issued on July 15, 2015. In August and December of 2015, Division Engineers were faced with either rulings of a water referee or new water court applications that raised potential concerns in light



of the *St. Jude's* ruling. These cases triggered questions as to how the Division Engineers should implement the *St. Jude's* ruling when carrying out their administrative and water court consultation duties. This instruction addresses the questions that have arisen to date and is premised on the decision by the State Engineer that, absent further guidance from the courts or the General Assembly, the *St. Jude's* ruling should be viewed in light of the facts before the Supreme Court and applied by the Division Engineers to claims for direct flow water rights for aesthetic, recreation, and piscatorial uses for the purpose of re-creating a natural stream on private property.

During the 2016 Regular Session of the General Assembly, legislation in response to the *St. Jude's* ruling was proposed but not enacted. Representatives of certain water users have contacted the State Engineer's office and indicated their desire for more time to pursue legislative changes in response to the *St. Jude's* ruling before the Division Engineers or the water courts implement the ruling to the potential detriment of decreed conditional or absolute water rights. The State Engineer has taken no position as to whether legislative changes are either needed or desirable, but understands certain water users' desire for more time.

4.0 INSTRUCTION

In carrying out their administrative and water court consultation duties, the Division Engineers should implement the *St. Jude's* ruling as follows:

- (1) For any water court applications for new tributary or nontributary surface or ground water rights, for changes of water rights, for findings of reasonable diligence, to make conditional water rights absolute, or for the approval of a plan for augmentation, the Division Engineers' consultations with the water referees should recommend that any claims for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property should be denied. The Division Engineers should then, generally, leave these claims for the parties and the court to resolve, but the Division Engineers may participate as to other issues or claims raised by such applications. The Division Engineers need not file statements of opposition, motions to intervene, or protests regarding such claims, but will reserve their right and ability to do so on a case-by-case basis in consultation with the State Engineer. As to applications for changes of water rights, for findings of reasonable diligence, to make conditional water rights absolute, or for the approval of a plan for augmentation that include claims regarding water rights previously decreed for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property, the Division



Engineers should not oppose an applicant's request to stay any such claims until the end of the 2017 Regular Session of the General Assembly. This paragraph applies to all change of water right water court applications under sections 37-92-302 and 37-92-305, C.R.S.

- (2) The State and Division Engineers should administer existing absolute and conditional decrees as well as augmentation plans as presently decreed, even if they include such uses, and should only raise objections when water court applications or well permit applications are filed. The State Engineer's office should not issue tributary or nontributary well permits for such uses for the purpose of re-creating a natural stream on private property.
- (3) As to aesthetic, recreation, and piscatorial uses in other contexts, especially the public/municipal context, the extent to which *St. Jude's* should apply, if at all, is not clear to the State Engineer. Accordingly, unless instructed otherwise by the State Engineer, the Division Engineers should not express any position at this time as to whether the *St. Jude's* ruling applies or may apply to public or private storage right claims that include aesthetic use in ponds or reservoirs or to public/municipal direct flow claims for aesthetic, recreation, and piscatorial uses. If consulted further by the Water Referee about the applicability of the *St. Jude's* rulings to such claims, the Division Engineer should share the State Engineer's current view that it is unclear whether the *St. Jude's* ruling should apply but affirm that every applicant bears the burden of proof to show 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. The Division Engineers should also provide notice of such claims to the State Engineer, the Colorado Water Conservation Board, and any other State department, division, board, or agency that requests such notice.
- (4) For any water court applications for absolute or conditional storage rights, which seek the right to release the stored water for recreation, piscatorial and aesthetic uses for the purpose of re-creating a natural stream on private property, the Division Engineers' consultations should recommend denial of claims for such uses of released water.
- (5) Because the applicability of the *St. Jude's* ruling to other contexts is unclear to the State Engineer, for sand and gravel pits that expose groundwater, the Supreme Court's decisions in the *Zigan* and *Three Bells* cases should continue to control, and their owners or operators may obtain well permits for aesthetic, recreation and piscatorial uses because these uses in such pits are not for the purpose of re-creating a natural stream on private property. The State and Division Engineers should also not recommend denial of water court



claims for aesthetic, recreation and piscatorial uses for excavations or pond wells that expose groundwater to the atmosphere because such uses in such structures are not for the purpose of re-creating a natural stream on private property.

- (6) For water court applications involving claims for direct-flow freshening flow water rights to serve ponds, reservoirs, or excavations or pond wells exposing groundwater to the atmosphere, the extent to which *St. Jude's* should apply, if at all, is not clear to the State Engineer. Accordingly, unless instructed otherwise by the State Engineer, the Division Engineers' consultations should not object to such water rights, but should request that the applicant prove up efficient rates to accomplish the purpose without waste. The Division Engineers should then, generally, leave these claims for the parties and the court to resolve. The Division Engineers need not file statements of opposition, motions to intervene, or protests regarding such claims, but will reserve their right and ability to do so on a case-by-case basis in consultation with the State Engineer.

This Written Instruction is subject to revision by the State Engineer at any time. The staff of the State Engineer's office and the Division Engineers shall retain their full discretion to consider each water court case or well permit application based on its own facts and circumstances and may depart from this Written Instruction with the approval of the State Engineer. This Written Instruction is not intended to establish any rule or policy to be relied upon by any person or party outside of the Colorado Division of Water Resources in any administrative or judicial proceeding.

Approved by:



Dick Wolfe, Director/State Engineer

Date: July 6, 2016

