CLOSING THE DOOR ON WATER SPECULATIONS:

NEVADA'S ADOPTION OF THE ANTI-SPECULATION DOCTRINE

BY DOUG CANNON, ESQ.

Speculators, in one form or another, have always been a part of Nevada's history. They have searched over basin and range throughout Nevada, hoping to find the next mother lode. A new kind of modern speculator has found another source of potential riches in Nevada's rural areas: groundwater.

Nevada is one of the most urbanized and driest states in the United States. These facts present some unique challenges from a water rights management perspective: residents in two localized areas need a resource that is spread throughout the state. Las Vegas and Reno have historically obtained a significant portion of their water supply from two sources, the Colorado River and the Truckee River, respectively. In recent years, Las Vegas and Reno have both faced the fact that these water sources are fully utilized or will be in the near future. Both Las Vegas and Reno have begun to look to groundwater from rural Nevada to support future growth.

The new brand of speculator has appeared, not with pick and shovel but with pump and pipeline, to search for this resource. In recent years, headlines have highlighted the news of large, costly pipelines bringing water from rural Nevada to the urban cores. However, the water speculators, whether private investors or governmental agencies, have found that the Nevada Supreme Court's adoption of the anti-speculation doctrine in *Bacher v. State Engineer* has placed some limits on speculative appropriations of water.[1]

The Beginnings of the Anti-Speculation Doctrine

The anti-speculation doctrine was first articulated in 1979 by the Colorado Supreme Court in *Colorado River Water Conservation District v. Vidler Tunnel Water Company.*[2] The case arose when Vidler Tunnel Water Company was granted a conditional appropriation of water for a large interbasin transfer project that was intended to provide water to Denver. Vidler received the conditional appropriation prior to having firm contracts with any municipality.

The court began its analysis by reiterating a long-standing premise of western water law: an appropriator must show intent to put the appropriated water to beneficial use in a reasonable amount of time. In this case, Vidler appropriated the water "on the assumption that growing population will produce a general need for more water in the future." The court found that a general need for water was not sufficient. Instead, to satisfy the necessary intent, an appropriator must show that they, individually, have the ability to place the water to beneficial use or that they represent a person committed to the actual beneficial use of the water. In the case of another person putting the water to beneficial use, the appropriator must show the existence of firm contracts or agency agreements. And so, the anti-speculation doctrine was born.

In formalizing the anti-speculation doctrine, the court stated, "[t]o recognize [water rights] grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains." In other words, a desire to reap profit is not sufficient reason to support an appropriation.

Nevada's Adoption of the Anti-Speculation Doctrine

In *Bacher,* the Nevada Supreme Court reviewed a district court's order denying residents of Sandy Valley the opportunity to seek judicial review of a decision of the Nevada state engineer.[3] The state engineer had approved an application by Vidler Water Company, acting as agent of Primm South Real Estate Company, to transfer water rights from the Sandy Valley Basin to the Ivanpah Basin, to be used by Primm South for expansion of various facilities in Primm, Nevada. Residents of Sandy Valley sought judicial review of the state engineer decision. The residents argued that Vidler, as the applicant, had to show a need for the water.

In responding to this argument, the court announced the adoption of the anti-speculation doctrine in Nevada. The court explained from the outset that the underlying purpose of the doctrine was to preclude water right acquisitions without a showing of beneficial use; in other words, speculative appropriations. The court reiterated the standard adopted in Colorado: the appropriator must show that it has intent to put the water to beneficial use for its own benefit or that it has a contractual or agency relationship with someone that intends to put the water to beneficial use.[4]

Vidler filed the applications to modify the place of use and point of diversion of certain water rights, as the agent for Primm South. Primm South owned property in Primm, and had specific plans to place the water to beneficial use. Based on these facts, the court found there was a clear agency relationship between Vidler and Primm South and that Primm South had a clear intent and ability to place the water to beneficial use. Thus, the anti-speculation doctrine was satisfied.[5]

In *Adaven Management, Inc. v. Mountain Falls Acquisition Corporation,* the Nevada Supreme Court further clarified the scope of the anti-speculation doctrine.[6] In this case, Adaven argued that the doctrine should be extended by the court to exclude the alienation of a water right separate from the land to which it is appurtenant. In response to this argument the court stated:

> "We adopted the anti-speculation doctrine as a limitation on an entity's ability to demonstrate beneficial use when it did not have definite plans to put water to beneficial use or a contractual relationship with an entity that had such plans. We did not adopt the anti-speculation doctrine as a limit on the free alienability of water rights, and now we clarify that the anti-speculation doctrine by itself does not limit the transfers of water rights ownership."

The Special Case of Governmental Water Agencies

While the *Bacher* and *Adaven* cases have given the Nevada Supreme Court the opportunity to apply the anti-speculation doctrine in the context of private appropriations and private interbasin transfers, the court has not had the opportunity to apply the doctrine in the context of municipal water purveyors. If the anti-speculation doctrine was strictly applied to a governmental water agency, that agency would only be allowed to appropriate the amount of water it could place to beneficial use at the time of the appropriation or within a reasonable time thereafter. Such a doctrine limits the ability of a government water agency from being able to secure long-term water supplies ahead of population growth. While the Nevada Supreme Court has not yet ruled on such a case, some

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guidance as to how the court may rule can, again, be gleaned from Colorado's application of the anti-speculation doctrine in the context of a governmental water agency.

In *City of Thornton v. Bijou Irrigation Co.*, the Colorado Supreme Court recognized an exception to the anti-speculation doctrine for governmental water agencies.[7] In this case, the court found it necessary to allow government water agencies to appropriate water without the direct ability to place the water to beneficial use immediately and, further, without firm, contractual commitments or agency relationships. Instead, appropriations were to be based on "the municipality's reasonably anticipated requirements, based on substantiated projections of future growth."

The scope of the anti-speculation doctrine exception for government water agencies was tested in *Pagosa Area Water and Sanitation District v. Trout Unlimited*.[8] In this case, the Pagosa Area Water and Sanitation District appropriated 29,000 acre-feet of water to be utilized over the next 100 years. The appropriation was challenged as being speculative. The Colorado court noted, from the outset, that "a governmental water supply agency has a unique need for planning flexibility because it must plan for the reasonable needs of its populace, taking into account a normal increase in population." However, the court cautioned that a "governmental agency does not have carte blanche to appropriate water for speculative purposes…[p]ublic agencies must still substantiate a non-speculative intent to appropriate unappropriated water…." To clarify the standard announced in the *City of Thornton* case, the court announced that a governmental agency, to obtain a non-speculative appropriation, must show:

> (1) a reasonable water supply planning period;
>
> (2) a substantiated population projection based on a normal rate of growth for the planning period; and
>
> (3) the amount of available, unappropriated water that is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply.

Under the specific facts of this case, the court found the necessary showings had not been made and the governmental appropriation was denied.

The Nevada state engineer, following the *Bacher* decision, reviewed appropriation applications brought by the Southern Nevada Water Authority that would bring water from the Spring Valley Basin to Las Vegas.[9] In its ruling, approving the appropriation in part, the state engineer acknowledged the *Bacher* decision and found the anti-speculation doctrine announced in *Bacher* was satisfied in that, "the Applicant has demonstrated a need for the water and has justified the need to import the water from another basin." This conclusion was reached, in part, based on the presentation of information from a Southern Nevada Water Authority (SNWA) resource plan that showed southern Nevada would need approximately 900,000 acre-feet of water by 2034, an amount that far exceeds current available supplies. It would be expected that the state engineer and the Nevada Supreme Court will refine the manner in which they look at governmental appropriations, as the occurrence of such appropriations continues to increase.

In Washoe County, no less than five different private parties are in varying stages of developing projects to bring groundwater to Reno. SNWA continues to actively pursue appropriation applications in rural Nevada to supply the future needs of Las Vegas. The adoption of the anti-speculation doctrine in Nevada has not slowed the proponents of these projects in going forward, whether driven by desire for profit or, more simply, by the desire to meet future municipal water demands. Ever waiting in the wings, as a check against these appropriators, is the anti-speculation doctrine. How big a check this doctrine will ultimately be on speculators is still an open question in Nevada. NL

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1 122 Nev. 1110, 146 P.3d 793 (2006).
2 594 P.2d 566 (Colo. 1979), superseded in part by statute.
3 122 Nev. 1110, 146 P.3d 793 (2006).
4 While the anti-speculation doctrine may be a new term in Nevada water law, the principles that drive the doctrine, primarily that of an appropriation being based on beneficial use, have long been tenets of Nevada water law. The tenets, in the context of an interbasin transfer, are found in Nevada Revised Statute 533.370(6). The state engineer has on many occasions, predating the Nevada Supreme Court adoption of the anti-speculation doctrine, denied applications that it viewed as speculative (See State Engineer Ruling No. 5255 (June 6, 2003), State Engineer Ruling No. 5262 (June 13, 2003)).
5 It is interesting to note that the court, in the end, found that the state engineer failed to make required findings and reversed the District Court's order denying judicial review.
6 124 Nev. Adv. Op. No. 67, 191 P.3d 1189 (2008).
7 926 P.2d 1 (Colo. 1996) (pages 37-40 of this case contain a good general description of the development of the anti-speculation doctrine).
8 170 P.3d 307 (Colo. 2007).
9 State Engineer Ruling No. 5726 (April 16, 2007).