

Colorado's Anti-Speculation Water Doctrine

Water Resources Review Committee September 4, 2014

Justice Greg Hobbs, Colorado Supreme Court

"The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." COLO. CONST. art. XVI, § 5.

"The true test of appropriation of water is the successful application thereof to the beneficial use." *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883).

"The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation." *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 152 (1892).

(Explaining why, under Colorado's Constitution, speculation is prohibited) "Mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." *Denver v. Northern Colorado Water Dist.*, 276 P.2d 992, 1009 (Colo. 1954).

"Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees 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." *Colorado River Water Conservation District v. Vidler Water Company*, 594 P.2d 566, 568 (Colo. 1979).

"Accumulation of conditional water rights is subject to Colorado's anti-speculation doctrine. 'Speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires' (citation omitted). A conditional decree may not be entered if 'the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation.'

Section 37-92-103 (3)(a). Either of two factors may defeat entry of a conditional decree:

(I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefitted by such appropriation.

(II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

These provisions are mirrored in subsection (9)(b) of section 37-92-305, which states that:

(b) No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.” *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 37 (Colo. 1997)(Emphasis in original).

“Based on Colorado’s statutory requirements . . . the limited governmental agency exception to the anti-speculation doctrine should be construed narrowly, in order to meet the state’s maximum utilization and optimum beneficial use goals . . . the water court should closely scrutinize a governmental agency’s claim for a planning period that exceeds fifty years.

The ultimate factual and legal issue in a governmental agency conditional appropriation case involves how much water should be conditionally decreed to the applicant. The experts who testified at the water court trial in this case were called upon to address such pertinent factors as: (1) implementation of reasonable water conservation measures for the planning period; (2) reasonably expected land use mixes during that period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes for that period; and (4) the amount of consumptive use reasonably necessary for use through the conditional appropriation to serve the increased population.” *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 170 P.2d 307, 317-18 (Colo. 2007).

“(T)he anti-speculation doctrine is rooted in the requirement that an appropriation of Colorado’s water resource must be for an actual beneficial use. We hold that, in defining ‘change of water right’ to include ‘a change in the type, place, or time of use ‘ and “a change in the point of diversion’ in section 37-92-103((5) (emphasis added), and in defining ‘appropriation’ in section 37-92-103(3)(a)(I)&(II), the 1969 Colorado Water Right Determination and Administration Act anticipates, as a basic predicate of an application for a decree changing the type and place of use, that the applicant will sufficiently demonstrate an actual beneficial use to be made at an identified location or locations under the change decree, if issued.” *High Plains A&M, LCC. v. Southeastern Water Conservancy District*, 120 P. 3d 710, 713 (Colo. 2005).