

**IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA**

IN THE MATTER OF PROTESTED)
APPLICATION 73969 FILED TO)
APPROPRIATE THE UNDERGROUND)
WATERS OF THE HUNTINGTON)
VALLEY HYDROGRAPHIC BASIN)
(47), ELKO COUNTY, NEVADA.)

RULING
#6095

GENERAL

I.

Application 73969 was filed on March 6, 2006, by Reed Ranching Company, Inc., to appropriate 4.5 cubic feet per second (cfs) of the underground waters of the Huntington Valley Hydrographic Basin for quasi-municipal purposes. The proposed place of use is described as being located within T.32N., R.55E., T.32N., R.56E., T.33N., R.55E., T.33N., R.56E., T.33N., R.57E., and T.34N., R.56E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33, T.31N., R.56E., M.D.B.&M.¹

II.

The application was timely protested by the Pershing County Water Conservation District of Nevada and Boyd Ranch, LLC on the grounds not to be considered in this ruling.¹

FINDINGS OF FACT

I.

By letter dated August 4, 2010, the Applicant was asked to provide additional information regarding its interest in pursuing Application 73969. In response, the Applicant indicated a desire to pursue the application; however, the Applicant also indicated that the water is not needed at this time:¹

Reed Ranching Co. Inc. would like to pursue application 73969. In July 2006, we were approached by a land developer in Spring Creek who wanted us to pipe water from our basin to Spring Creek. Due to the economic down turn, he is unable to continue his process, but is interested in our water when the economy in Spring Creek area improves.

¹ File No. 73969, official records in the Office of the State Engineer.

The letter indicates that the current economic situations have caused whatever project that may have been contemplated by a third party to be discontinued until those economic conditions change. The application specifies a diversion rate of 4.5 cfs and no associated duty of water is mentioned. A review of the application file does not identify any specific project for which the water would be used or the quantity of water that would be necessary for any such project. A review of the proposed place of use shows a lack of specificity, encompassing 6 townships (216 sq. miles or approximately 138,240 acres) and includes public and private lands including the South Fork Reservoir, South Fork State Recreation Area, portions of the South Fork Indian Reservation, and the community of Spring Creek.

Nevada Revised Statute § 533.030 provides that water may only be appropriated for a beneficial use and not otherwise. Nevada Revised Statute § 533.370(1)(c) provides that when approving or rejecting an application the applicant must provide proof satisfactory of his intention in good faith to construct any work necessary to apply water to the intended beneficial use with reasonable diligence and his financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

The State Engineer finds that the beneficial use requirement provides that the Applicant must demonstrate an actual beneficial use for the water applied for and does not allow for an applicant to tie up water for some project it might find in the future. The State Engineer finds the Nevada legislature has demonstrated its concern with speculating in water rights by enacting NRS § 533.370(1)(c), which requires that an Applicant provide proof satisfactory of a good faith intention to actually construct the project with reasonable diligence and that it has the financial ability and reasonable expectation actually to construct the project.

The State Engineer finds it threatens to prove detrimental to the public interest to allow an applicant to hold on to a water right application when it is unable to demonstrate an actual project for which the water will be used. The State Engineer finds no evidence of the actual beneficial use to be made and nothing to specifically support the quantity of water applied for under this application. The State Engineer finds that the Applicant asserts that economic conditions must change before a plan to put water to beneficial use is made and this indicates that the Applicant does not have the ability to proceed with a project at this time and there is not a reasonable expectation to place water to the intended beneficial use with reasonable diligence.

II.

Nevada Revised Statute § 533.370(6) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) Whether the applicant has justified the need to import the water from another basin; (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) Any other factor the State Engineer determines to be relevant.

The Nevada Supreme Court in *Bacher v. State Engineer*, 122 Nev. 1110, 146 P.2d 793 (2006) held that an applicant can satisfy the “need to import water” requirement of NRS § 533.370(6)(a) by providing evidence of third-party need. The court concluded that an agent may request a water right permit based on the ultimate user’s need for water, but also adopted the anti-speculation doctrine, which requires the agent to have a contractual or agency relationship with the water’s appropriator. The court concluded nearly 100 years ago “that he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator.”² In the *Bacher* opinion, the court addressed absolute fundamentals of Nevada water law such as, the right to use water for a beneficial use depends on a party actually using the water, and once beneficial use is established, the quantity of water appropriated shall be limited to the amount reasonably required for the beneficial use to be served, and the court found that an applicant’s ability to satisfy NRS § 533.370(6)(a)’s requirement by demonstrating third-party need is limited by the “anti-speculation doctrine.”

This doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State’s water law jurisprudence. Thus, we agree with this limit on an applicant’s showing of third-party need and adopt the anti-speculation doctrine’s formal relationship requirement for Nevada. Further, we note that our adoption of this doctrine comports with the language and goals of NRS 533.370(1)(c)(2),

² *Prosole v. Steamboat Canal Co.*, 37 Nev. 254, 258-259, 140 P. 720, 722 (1914).

which, to protect against speculation, requires the applicant to show both financial ability and a reasonable expectation with respect not only to constructing any work needed to apply the water, but also to “apply the water to the intended beneficial use with reasonable diligence.”

The issue of speculating in water rights has been previously addressed in numerous rulings.³ For example, in State Engineer’s Ruling No. 5612, the Applicant requested 2.0 cfs of underground water for quasi-municipal purposes within Washoe County. Citing to NRS §§ 533.335 and 533.370, it was determined that the Applicant must satisfactorily demonstrate to the State Engineer the specific project where the water will be beneficially used and how the water is to be provided for the specific project. The Applicant was unable to demonstrate where the 120 afa of water being applied for would be specifically used or for what project it would be used, but only indicated a desire to use the water anywhere in the Nevada part of the Cold Spring Hydrographic Basin. The State Engineer found that the place of use was over 4,000 acres of land and the Applicant intended to build something residential, commercial, or industrial using the 120 afa somewhere within the acreage. The State Engineer found that the Applicant did not demonstrate who would provide water to whatever the project would be, but rather indicated the project was to be served water by someone to be determined in the future. The State Engineer found that the Applicant did not provide anything specific as to what would be built and where. The State Engineer found that the Applicant needed to identify a specific project on which the quantity of water requested for appropriation would be used. The State Engineer concluded that to grant a permit where the Applicant has not adequately demonstrated a specific project as required under NRS § 533.335 would threaten to prove detrimental to the public interest and not meet the requirements of NRS § 533.370.

The State Engineer finds that similar applications were denied wholly or in part on the grounds the applications were speculative where there was no definitive project or use of water specified and the amount of water required for any identifiable project could not be justified. The State Engineer finds that the Applicant has indicated that the current economic situations have caused whatever project may have been contemplated by a third party to be discontinued until those economic conditions change; therefore, no beneficial use of the water is identified and

³ State Engineer Ruling Nos. 4192, 4307, 4548, 5612, 5782, 5997 and 6063, official records in the Office of the State Engineer.

no evidence can be provided as to the amount of water reasonably required for any specific project. The State Engineer finds a lack of specificity as to where water would be used within the place of use and in what quantities; thus, there is no evidence of the actual beneficial use. The State Engineer finds that the proposed use of water for a project only described as quasi-municipal use somewhere within the vast place of use of approximately 138,240 acres is too vague to properly evaluate potential conflicts with existing rights, protectible interests in domestic wells, and whether the use would threaten to prove detrimental to the public interest. The State Engineer finds that the Applicant has no discernable project at this time and the application is filed for speculative purposes.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁵

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that to consider an application where the Applicant has not adequately demonstrated a specific project as required under NRS § 533.335 would threaten to prove detrimental to the public interest and not meet the requirements of NRS § 533.370. The State Engineer concludes that the application is filed for speculative purposes as evidenced by the Applicant's letter of August 30, 2010, and the related findings herein.

IV.

The State Engineer concludes that the approval of the application would threaten to prove detrimental to the public interest and violate the provisions of Nevada water law.

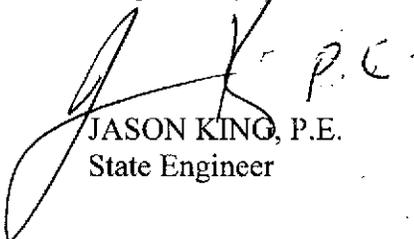
⁴ NRS Chapters 533 and 534.

⁵ NRS § 533.370(5).

RULING

Application 73696 is hereby denied on the grounds that the application was filed for speculative purposes and its approval would threaten to prove detrimental to the public interest. No ruling is made on the merits of the protests.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 16th day of

February, 2011.