Case Study: High Plains A&M v. Southeastern Colorado Water Conservancy District Management (Change of Use, Anti-Speculation)

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The High Plains Changes of Water Rights

- As Population in the Arkansas River Basin Has Increased, So Has the Demand for Water, Making Agricultural Water Rights More Valuable
- The Facts of the High Plains Case
  - High Plains claimed ownership or control of approximately 30% of the outstanding shares of the Fort Lyon Canal Company
  - High Plains sought to any beneficial use, including over fifty identified potential uses
  - in any location within twenty-eight Colorado counties
  - No contracts for use of water

Water Court

- Here, the Applicants seek the change for virtually any use where water may be necessary without identifying the specific use and/or end user. Applicants' plan is so expansive and nebulous that it is impossible for other holders of water rights to determine whether they will be injured. Furthermore, there is no discernible method to determine whether the water will be put to a beneficial use.

Water Court

- The water court found that such an application could “easily circumvent the anti-speculation doctrine” and concluded that the doctrine must be applied to the change applications. The court found the applications to be speculative in nature and granted the opposers' summary judgment motion.

The Anti-Speculation Doctrine: A Fundamental Principle of Colorado Water Law

- The Anti-Speculation Doctrine Developed From the Requirement to Beneficially Use Water
- The Colorado Constitution and Statutes Guarantee a Right to Appropriate but Not to Speculate
- New Appropriations of Conditional Water Rights Provided the Context for Early Development of the Anti-Speculation Doctrine

The High Plains Decision Applied the Anti-Speculation Doctrine to Applications for Changes of Water Rights

- To Change the Use of the Water Right, an Applicant Must Prove an Actual Beneficial Use
- High Plains Could Not Demonstrate an Actual Plan or Intent to Use Water as Proposed in its Applications

Colorado Supreme Court

- We hold that, in defining “[c]hange 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), C.R.S. (2005)(emphasis added), and in defining “appropriation” in section 37-92-103(3)(a), the 1969 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.

Colorado Supreme Court

- It is possible that High Plains harbored unrealistic expectations when it purchased such a large interest in FLCC. The water court's concern about the “nebulous and expansive” nature and scope of the High Plains application undoubtedly stems from ambiguity about whom the requested change decree is going to serve, when, how, and in what capacity-ranging from simple resale of some or all of the shares over time to providing raw or retail water service to others.

Colorado Supreme Court

- In any event, High Plains' applications for a change in the type and place of use are premature in the absence of identified places of actual beneficial use for operation of the change decree. As we said in Combs, a stockholder in an irrigating company “can only transfer his priority to some one who will continue to use the water.” 17 Colo. at 152, 28 P. at 968.
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The End?

- Public Entities May Plan for Future Growth Without Violating the Anti-Speculation Doctrine
- The problem of “partly speculative” change applications and unrealized changes