

***The Anti-Speculation Doctrine in Water Law:
Ghost-busting, Trust-busting, or Ensuring Reasonable, Beneficial Use?***

Abstract (Mar. 16, 2008) [†]

From Texas tycoon T. Boone Pickens to corporate conglomerate Nestlé Co., grandiose schemes to profit from large-scale, transbasin water transfers have proliferated in the past decade. Reactions range from outrage at the commoditization of this precious resource to support for letting the market and its pricing signals move water to the most efficient use.

On the international front, the World Bank and the International Monetary Fund have encouraged nations, particularly those in the developing world, to conform to a market paradigm by privatizing and thereby maximizing use of their water supplies. Affected communities are often less than enthusiastic. Throughout the world, attempts to privatize water resources have triggered a “morality play of rights versus markets, human need versus corporate greed.” James Salzman, *Thirst: A Short History of Drinking Water*, 18 *Yale J.L.H.* 94, 96 (2006).

The controversy is not limited to developing countries. However, prohibitions against speculation have inhibited outright commoditization of water in the United States.

To speculate is to “assume a business risk in hope of gain; especially to buy or sell in expectation of profiting from market fluctuations.” MERRIAM-WEBSTER ONLINE DICTIONARY (2007), <http://www.m-w.com/dictionary/Speculate>. Speculation is a relatively common investment practice for real property (land), stocks, bonds, grain, gold, and other precious minerals. When it comes to water, however, speculation is taboo.

In the West, the prior appropriation doctrine limits the ability to hoard water for speculative purposes by requiring that water be put to continuous beneficial use. Users who fail to do so forfeit their rights. Under the eastern system of riparian water law, the possibility of speculation is limited by a number of factors, including the duty of riparian owners to share, the reasonable use doctrine, and common law prohibitions against off-tract and out-of-watershed usage.

The various anti-speculation provisions are intended to keep the reviled Robber Barons of yesteryear in their place and prevent them from coming back to haunt us as modern-day Water Barons. This talk considers whether restrictions against speculation in water serve a continuing public purpose or, conversely, are an archaic relic of times past. Is there a current need to prevent speculation and monopolistic behavior (trust-busting), or are we merely chasing ghostly apparitions of fictitious Water Barons while discouraging socially beneficial water transfers?

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Many scholars of law and economics argue that restraints on water transfers should be removed to allow water marketing to take its place among an array of collaborative, conservation-oriented strategies for water management. Yet because market forces tend to focus only on short planning cycles and fail to prevent the imposition of harmful externalities on non-parties, market transactions have significant potential to compromise the needs of current and future generations of water users and to undermine governmental authority over essential water resources. To the extent that society envisions water marketing as a tool to reallocate water supplies, governments must continue to play a significant role in overseeing water transfers – particularly speculative transactions that fail to put water to reasonable, beneficial uses – to ensure that the interests of affected third parties are protected and that water remains available for the public good. Thus, rescission of the anti-speculation doctrine would be unwise.