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Bacher v. Office of State Eng'r of the State of Nevada, 146 P.3d 793 (Nev. 2006)

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court ruled in Zaveta's favor and required Mustang to restore the ditch.

On appeal, Mustang argued that the district court abused its discretion because none of the five statutory situations in which a court may grant a preliminary injunction applied here. Specifically, none of the situations addressed granting an injunction to remedy past injuries. Because Mustang completely destroyed the ditch before Zaveta requested a preliminary injunction there was no action to enjoin. In reversing the trial court, the Montana Supreme Court also relied on *Bouma v. Bynum Irrigation District*. In *Bouma*, the court upheld the trial court's denial of a preliminary injunction under similar circumstances and states that "an injunction . . . is to afford preventive relief only."

The court noted that the trial court had not yet made findings regarding whether Zaveta held a valid easement over Mustang's property or if the easement was extinguished when the water rights were terminated for nonpayment of claim fees. Should Zaveta prevail in those proceedings, she would then have a possible remedy in the form of damages or enjoining Mustang. However, because Mustang had completed the destruction of the ditch, the preliminary injunction issued by the district court was erroneous and constituted an abuse of its discretion. The court therefore reversed the district court's order granting Zaveta a preliminary injunction and held in favor of Mustang.

In a lengthy opinion, the dissent raised multiple arguments, including the validity of the underlying water rights, the existence of a prescriptive easement, and legislative intent on the importance of irrigation ditches. Moreover, the court distinguished the facts of this case from those of *Bouma*. In *Bouma*, the plaintiff constructed dams in a canal to prevent the contaminated water at issue from entering his property prior to the court ruling on the plaintiff's motion for a preliminary injunction. The dissent distinguished *Bouma* because the contested action stopped the harm. Mustang's action of destroying the ditch, on the other hand, caused Zaveta's harm by ceasing her access to water. Therefore, the dissent argued, the majority erred by holding that the remedy by injunction was not an option as enjoining Mustang to restore the ditch would resolve the problem.

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Bacher v. Office of State Eng'r of the State of Nevada, 146 P.3d 793 (Nev. 2006) (holding that applicants can demonstrate a need to import water through third parties, that the anti-speculation doctrine applies in Nevada, and that the State Engineer's decisions regarding water applications must be supported by substantial evidence).

In 1999, Primm South Real Estate Company sought, through its agent, Vidler Water Company, an interbasin groundwater transfer

from the Sandy Valley Basin, Nevada, to the Ivanpah Basin, Nevada. Residents of the Sandy Valley Basin opposed the transfer. The State Engineer approved the transfer, and the residents of Sandy Valley subsequently filed a petition for judicial review of the decision in the Eighth Judicial District Court, Clark County. The district court denied the petition, and the residents appealed to the Supreme Court of Nevada.

The residents first argued that Nevada Revised Statute 533.370(6)(a), which requires a showing of need to import water, can only be satisfied when an applicant shows personal need for water. The court disagreed. The court found that the statute was ambiguous as to whose need must be shown, and interpreted it according to reason and public policy. The court considered a 1914 Nevada case, *Prosole v. Steamboat Canal Co.*, in which it determined that it was reasonable to allow the water user's agent to file an application for a water diversion. Even though that decision was issued before the statute in question was enacted, the court found that the ruling proved that it was reasonable for third parties to apply for water permits on the behalf of others. The court also cited cases from New Mexico and Wyoming, which demonstrated that third parties can reasonably satisfy certain water permit requirements. The court concluded that the legislature intended to allow applicants for water to rely on a third-party's need. The court limited the reach of its holding by adopting in its ruling the anti-speculation doctrine. Under this doctrine, which is intended to prevent water speculation, only applicants with agency or contractual relationships with third parties may use those third parties to demonstrate need. The court found that this holding was consistent with Nevada Revised Statute 533.370(1)(c)(2), which also serves to prevent speculation, by requiring applicants to show financial ability and a reasonable expectation to apply appropriated water to a beneficial use.

Next, the residents asked the court to consider if the State Engineer abused his discretion in granting the transfer. The court stated that it would not substitute its own judgment for the State Engineer's judgment, but rather that it would consider whether the record contained substantial evidence to support the State Engineer's decision. It defined "substantial evidence" as "evidence which a reasonable mind might accept as adequate to support a conclusion." While the court found that the State Engineer had substantial evidence to show that the residents of Sandy Valley would not be detrimentally impacted by the transfer, it did not find substantial evidence to show Primm South's need for water. The court reversed the district court's order denying the resident's petition for judicial review.

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