

Opinion No. 53-5675

February 17, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. John H. Bliss State Engineer Santa Fe, New Mexico

{*67} On February 2, 1953, you addressed an inquiry to this office concerning whether, as provided in {*68} §§ 77-302 et seq., N.M.S.A., 1941 Compilation, the Federal Fish and Wildlife Service is subject to the assessment of a proportionate amount of costs for a watermaster when they are using water appropriated under certain files, which appropriation was originally allocated to private parties and later purchased by the Federal Fish and Wildlife Service.

Section 77-302 provides for the method of setting up the services of a watermaster in any given district. The provisions of said section are as follows:

"The state engineer shall upon the written application of a majority of the water users of any district in this state, appoint a water master for such district in the state, who may, for cause, be removed by the state engineer, and shall be removed upon a petition of a majority of the water users of said district. The water master shall have immediate charge of the apportionment of waters in his district under the general supervision of the state engineer, and he shall so appropriate, regulate and control the waters of the district as will prevent waste. The state engineer may, if in his opinion the public safety or interests of water users in any district in the state require it, appoint such water master for temporary or permanent service in such district, in the absence of the application above provided for in this article."

Section 77-304 is concerned with the method of payment of the watermaster's salary. It provides that the assessment shall be made by the State Engineer and certified to the County Commissioners. The County Commissioners, in turn, then assess the proportionate amount for the payment of the watermaster against the water users, based upon the amount of water used by such water users. This provision is not a tax but merely a method of collecting for the services of the watermaster.

The entire question here is whether or not the federal government is exempt from assessments of this nature against an agency or department of the United States.

In 56 Am. Jur. 745 reference is made to the Desert Land Act of 1877, and quotes from the case of California-Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 142, 79 L. Ed. 1356, 55 S. Ct. 725, as follows:

"After the enactment of the Desert Land Act of 1877, if not before, all non-navigable waters in any part of the public domain become public juris, subject to the plenary control of the designated states, including those thereafter created out of the territories

named, with the right in each to determine for itself to what extent the law of appropriation or the common-law rule in respect of riparian rights should apply, the act not binding the states to any policy, but recognizing and giving sanction, as regards the United States and its future grantees, to the state and local doctrine of appropriation."

It is also stated in 56 Am. Jur. 745 as follows, to-wit:

"Congress has enacted legislation recognizing and sanctioning local laws and customs in respect of the appropriation of waters on the public lands. The Federal government has the power, however, to reserve waters of a river flowing through a territory and exempt from appropriation under the laws of a state subsequently {*69} established out of such territory. "Subject to constitutional guarantees for the protection of property rights, the public authority, under the police power, may enact and enforce reasonable regulations in respect of the exercise of the right of appropriation. In some jurisdictions, the matter is placed within the control of an administrative board or commission. Where the United States has relinquished to a state all of its rights to non-navigable waters, the state has the right to fix the terms upon which such waters may be appropriated."

54 Am. Jur., p. 476, states that the United States may be liable, like a private individual, on the theory of implied contract. The services rendered by the watermaster were contracted for by a majority of the water users in the district involved herein. The United States merely succeeded to the rights of the private owners under the files which they now own. The duties and obligations of those files were also succeeded to by the United States Government at the time of the purchase of the rights. It is a well settled rule that one cannot acquire rights without also acquiring attendant obligations and duties.

It is conceded that no tax can be levied against the United States Government in regard to the use of any lands, but the user of lands may be assessed for the payment of services and the United States stands in no different position than a private individual. The United States Supreme Court has repeatedly held that the rights in waters are subject to the regulation, control and policies of the individual states. The adjudication and regulation of ditches and streams for the benefit of water users comes within the authority of the states. When an agency of the United States Government becomes a water user the authority is not in any way diminished or changed. When an agency of the United States Government becomes a water user it is obligated to abide by the laws set up by the various states. One of the laws that the State of New Mexico has promulgated for the control of surface water within the borders of this state is the above cited provision for the appointment of a watermaster. The watermaster serves as an allocating and distribution officer over the area in his charge. His function is one of service and the statute expressly places an obligation upon the water users to pay for that service. An agency of the United States Government, when it is classed as a water user, is under the same obligation as any other water user for the payment of services.

It is therefore the opinion of this office that assessments made against the Federal Fish and Wildlife Service constitute an obligation due and an obligation for which that Service is liable.

We sincerely hope that this answers your inquiry.

By: Fred M. Standley

Assist. Attorney General