Opinion No. 55-6102

February 14, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable Earl Stull, Jr., Chairman, House Committee on Irrigation, Drainage and Conservancy, State Capitol Building, Santa Fe, New Mexico, and Honorable John H. Bliss, State Engineer, State Capitol Building, Santa Fe, New Mexico

In answer to the letter from the State Engineer's Office dated February 11, and the letter of the same date from the Honorable Earl Stull, Jr., regarding the construction of Section 75-5-17, New Mexico Statutes Annotated, 1953, please be advised as follows:

The only New Mexico case in which this statute has been cited is the case of Harkey et al, vs. Smith, et al, 31 N.M. 521, 247 P. 550. The Harkey case involved a controversy over the water of the Black river system in Eddy County. The defendants claimed that the plaintiffs had forfeited the right to use the water from October 15 to March 15 each year. On discussing the Water Laws of 1907 the Court stated:

"In this connection, it is to be noted that § 43 of the Act prescribes the duty of water as one second foot of water for each 70 acres."

Further in the opinion the Court stated:

"But under the old arid region doctrine it was necessary to hold that beneficial use, both as to volume and period of time, was the evidence and measure of the right, and hence an irrigator might by conduct limit his right to certain periods of the year. Now, however, under our statute, the grant under the permit of the state engineer and the decree of the Court marks the limit of the right."

The above remarks by the New Mexico Supreme Court are dicta as far as the amount and rate of diversion are concerned but these remarks should be construed carefully since it is the only time that the New Mexico Supreme Court has spoken on this subject. The Court went on to hold that the plaintiff's rights were prior in time and enjoined the defendants from using any of said water at any season of the year so long as plaintiff's desire and are applying same to their beneficial use. From a reading of this case and a perusal of the 1907 Water Code, it can be seen that § 75-5-17 was enacted to protect both the senior and junior appropriators. Without the benefit of § 75-5-17 the down-stream senior appropriator could enjoin the up-stream junior appropriator from any use of water so long as the senior appropriator could put the same to beneficial use.

The Supreme Court of Wyoming has construed a statute similar to the New Mexico one in the case of Quinn, et al, vs. John Whitaker Ranch Company, et al. The plaintiffs in this case were adjudicated water exceeding 1 cu. ft. per second for each 70 acres of

land under a Territorial Court Decree of 1889. In 1890 the legislature of Wyoming enacted a law providing:

". . . that no allotment shall exceed 1 cu. ft. per second for each 70 acres of land for which said appropriation shall be made."

The Court stated:

"The power of a legislature to change the maximum quantity of water adjudicated to an appropriator under previous laws may be doubted. The question of power need not be decided. If the legislature has the power it need not be exercised . . ."

"We cannot hold that the legislature had declared that the use of a volume of water in excess of 1 cu. ft. per second for 70 acres of land under an adjudication granting a larger quantity is prima facie evidence of waste."

The Wyoming Court went on to hold that water rights adjudicated prior to the passage of the statute were not controlled by the statute and therefore not limited to 1 cu. ft. per second for 70 acres of land.

While neither of these cases above are of definite aid in the construction of § 75-5-17, we have quoted from them to show the thinking of the Supreme Courts of New Mexico and Wyoming on this subject. We feel that only one interpretation can be given to § 75-5-17, that the rate of diversion shall not be in excess of 1 cu. ft. of water per second for each 70 acres or the equivalent thereof delivered on the land. The words "or the equivalent thereof" refer to acres, that is, 1 cu. ft. of water per second for 70 acres, 2 cu. ft. of water per second for each 140 acres, etc. We feel that this is the only interpretation that can carry out the intent of the Legislature. It has been called to our attention that the statutes should be interpreted to read:

"The amount allowed shall not be in excess of the rate of 1 cu. ft. of water per second, **continuous flow or the equivalent thereof** for each 70 acres delivered on the land."

This would require that the words "continuous flow" would have to be interpolated into the statute. This cannot be done. The enactments of the Legislature must be construed as they are and nothing can be added to or subtracted from said enactments.

Nothing in this opinion should be construed as passing on the merits of this section or on the question of whether the same should be repealed or amended.