

Opinion No. 58-92

May 2, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: S. E. Reynolds, Secretary, Interstate Stream Commission, P. O. Box 1079, Santa Fe, New Mexico

QUESTION

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The Interstate Stream Commission proposes to enter into an agreement with certain irrigation companies whereby the Commission agrees to conduct a "feasibility study" regarding the rehabilitation and repair of Cabresto Dam for a consideration of \$ 2,000.00. If, however, the project is not economically feasible, the companies are not liable to reimburse the Commission's Irrigation Works Construction Fund for any amount of the costs of the study. In view of the foregoing, may the Commission expend the \$ 2,000.00 as outlined above should the project be determined not to be economically feasible?

CONCLUSION

Yes.

OPINION

ANALYSIS

Two New Mexico corporations own and operate Cabresto Reservoir in Taos County, New Mexico. The said reservoir is badly in need of rehabilitation and repair and the Board of Directors of each of the companies have deemed it advisable that an investigation and survey be made to determine the feasibility and cost to rehabilitate and repair the said dam. It has been proposed that the companies and the Interstate Stream Commission enter into an agreement whereby the Commission will, through its staff or by contract, investigate, study and survey Cabresto Dam and Reservoir and determine whether the dam and reservoir can be rehabilitated and repaired. The cost of the investigation and survey is not to exceed \$ 2,000.00 and shall be paid out of the New Mexico Irrigation Works Construction Fund.

In paragraph 2 of the proposed contract, the following provision is contained therein:

"The Companies jointly and severally agree that if the project is approved by the Commission and the Companies as physically and economically feasible, as provided in

Section 75-34-11, N.M.S.A. 1953, 1955 Supp., they will reimburse the New Mexico Irrigation Works Construction Fund for all amounts expended for said investigation and survey without any additions for administrative expense of the Commission. It is expressly agreed that the Companies shall not be liable to repay any amounts herein agreed to be repaid unless and until said project is approved by the Commission and the Companies and determined to be feasible."

The question which arises from the above is whether the \$ 2,000.00 can be paid out of the New Mexico Irrigation Works Construction Fund should the project not be economically feasible. As indicated in our conclusion, our answer is in the affirmative.

Chapter 266, Laws of 1955, authorizes the Interstate Stream Commission to enter into construction contracts and to expend certain funds made available to the agency for the maintenance, repair and operation of water storage works, including reservoirs and dams. Section 75-34-11, N.M.S.A., 1953 Compilation, P.S., states that the purpose of the Act is to meet a state-wide need for the conservation and use of water in the State. The Commission is to be empowered to make such investigations as may be necessary to plan and carry out a comprehensive state-wide program of water conservation. In the instant case, the Commission apparently feels that the proposed survey and the possible rehabilitation of Cabresto Dam would be in the public interest. The primary question which seems to arise is whether the State Engineer can conduct the investigation when the dams are currently owned by the companies.

The present Act has not been construed by our Courts nor has a contract of this nature been considered. Our Supreme Court, in the case of State v. District Court of Fourth Judicial District, 39 N.M. 523, 51 P. 2d 239, construed a previous Act which was superseded by Chapter 266, Session Laws of 1955. In that case, it was stated that in regarding water rights that the State of New Mexico performs not only a governmental or public function, but also promotes its proprietary interests; that the State is a large land holder and has a vested right in the use of public streams of the State. We assume that in the instant case that the State, through the Interstate Stream Commission, proposes to make this feasibility study to conserve and protect its vested rights in public waters. It would seem to follow, therefore, that the State would receive a direct benefit and that the study would not be a gift to the two companies owning Cabresto Dam and Reservoir.

Since the Interstate Stream Commission appears to have the necessary authority to conduct the investigation, we see no reason why they should not be allowed to contract to have the study paid for by the companies owning the dam and reservoir should the companies agree to do so. As we have indicated above, there is no gift of funds or services to the companies since the State will receive benefits in knowing whether the dam and reservoir can be rehabilitated. It is, therefore, our opinion that the proposed contract is both legal and proper.