

Opinion No. 59-05

January 26, 1959

BY: FRANK B. ZINN, Attorney General

TO: S. E. Reynolds State Engineer P. O. Box 1079 Santa Fe, New Mexico

Authority of State Engineer to authorize drilling of a replacement well without notice within 200 feet of original well.

OPINION

{*10} Your letter seeking my opinion asked the following question:

Can the State Engineer allow a replacement well to be drilled within 200 feet of the original well without following the notice procedure as set forth in Section 75-11-7, N.M.S.A., 1953?

In my opinion the answer to your question is as follows:

No, Section 75-11-7 must be followed whenever there is any change in location of a well which comes within the jurisdiction of the State Engineer.

The opinion I have rendered is based upon the following analysis of applicable law.

By way of preface, we would call attention to the fact that Article 11 of Chapter 75 of the 1953 Compilation sets up a comprehensive system for the control of underground waters in New Mexico. State ex rel. Bliss v. Douty, 55 N.M. 12, 225 P. 2d 1007. In this case it further provided that the statute provides the exclusive method of acquiring rights from the underground sources named in the statute.

It is assumed, as indicated in your request, that the problem really arises only in cases of emergency. These emergencies generally occur in the midst of the growing season at which time there is an immediate need for instant action in order that the user can save his crops.

Section 75-11-7, N.M.S.A., 1953, reads as follows:

"The owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer and upon showing that such change or changes will not impair existing rights and to be granted only after such advertisement and hearing as are prescribed in the case of original applications.

When the owner of a water right makes application or applications for a temporary change of not to exceed one year for not more than three acre-feet of water to a

different location, or to a different use, or both, the state engineer shall make an investigation, and, if such change does not permanently impair any vested rights of others, he shall make an order authorizing the change. If he shall find that the change sought might impair such rights, he shall order advertisement and hearing as in other cases."

Obviously, the requirement for publication in cases of change of location of the well creates the problem. After publication of the notice, the crops are past salvage. The second paragraph of the law with reference to temporary change of location is not helpful because the change proposed really is not temporary but amounts to a replacing of the well which was lost.

It is our understanding that in the past the State Engineer has allowed emergency replacement wells to be drilled within 200 feet of the original well which became defunct, and this has been done without notice by publication, the evident reasoning being that such replacement well within this 200 foot area is not a change of location {**11*} and therefore no notice is required to be published. (State Engineer Order # 47, October 29, 1954)

We find no authority in the statutes for emergency replacement wells. In view of this fact, it seems that under the present posture of the underground water law, that the replacement well would in fact be a change of location and can only be accomplished by following the statutory procedure set forth in Section 75-11-7. We particularly call attention to the case of "In the Matter of the Application of M. T. Brown and C. V. Hoke, Protested by Chester E. Barnett, File P-795 v. M. T. Brown et al., No. 6435, N.M. , 332 P. 2d 475," which holds that Section 75-11-7 must be followed prior to a change of location of a well.

We would suggest that legislation should be introduced to take care of this problem inasmuch as there seems to be a need for a speedy means of providing for an emergency replacement well.

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