

Opinion No. 61-73

August 11, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

TO: Mr. S. E. Reynolds, State Engineer, State Capitol, Santa Fe, New Mexico

QUESTION

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Must the State Engineer require application and publication of notice of change of place of use of underground waters when the description of the land actually irrigated varies slightly from that shown on the original application?

CONCLUSION

No.

OPINION

ANALYSIS

You have advised that Section 75-11-3, N.M.S.A., 1953 Comp., requires that an application from a person wishing to appropriate water from an underground source for the irrigation of land must include the description of the land proposed to be irrigated. Frequently, however, at the time of presenting proof of application to beneficial use of the water developed, the land actually subject to irrigation differs slightly from that described on the original application. When this has occurred, it has heretofore been your practice to require the irrigator to submit an application for transfer of place of use, however slight the deviation.

The question has now been presented whether this is required under the law, since, if the deviation is slight, it is virtually impossible to see how anyone's rights could be adversely affected.

The language pertinent to this question is that found in the first paragraph of Section 75-11-3, supra. This paragraph reads, in part, as follows:

"Any person, firm or corporation desiring to appropriate for irrigation or industrial uses of any of the waters described in this act shall make application * * * in which said applicant shall designate * * * the use for which it is desired and if the proposed use is irrigation, the description of the land to be irrigated and the name of the owner thereof."

At first impression, it would appear that this language would require that the applicant identify with specific description the land to be irrigated. However, when one recognizes the purpose for the application and the information which it must disclose, as well as the practical difficulties such strict construction imposes, one is led to another conclusion. The information set forth on the application has as its principal purpose, the furnishing of information to the State Engineer, as well as the public at large through advertisement of the place, nature and extent of the diversion and the place and manner of use, so that it can be determined whether there is unappropriated water or impairment of existing rights. Recognizing this, it is difficult to perceive how any-one could be adversely affected if the deviation in land use is minor in scope and particularly if the land under cultivation is contiguous to that identified in the original application.

In addition, recognition can be given to the practical difficulties the landowner would experience in attempting to describe with absolute accuracy in the original application the land he proposed to irrigate. At that time, he would not, in most circumstances, have made any effort to place the land under cultivation; he would not be familiar with all the problems with which he will be faced at the time of leveling and subjugation. Further, it would appear to require economic waste to force him to the expense of the rigid surveys and engineering studies undertaken once the appropriative rights is granted but before actual development of the land. It is our opinion that such was not the intent of the legislature in adopting our underground code and, particularly, Section 75-11-3, supra, or for that matter Section 75-11-7, N.M.S.A., 1953 Comp., which requires an application when a change of use is contemplated.

Hence, it is our conclusion that you, as State Engineer, need not require an application for change of place of use when the proof of beneficial use discloses that the legal description of the actual acreage irrigated is substantially the same as that shown on the original application. However, should there be substantial variation or, in any event, should the acreage irrigated be noncontiguous to that shown on the original application, then another application should be required. The duty of the State Engineer to enforce the statutes involved herein carries with it the responsibility to determine whether the variation is substantial enough to require a new application. In the exercise of this responsibility, the State Engineer must, of course, use reasonable discretion.