

Opinion No. 64-01

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BY: OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: D. A. Martin, Secretary, Bloomfield Irrigation District Bloomfield, New Mexico

QUESTION

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Can irrigation districts acquire water rights and hold such rights in a "rental account"?

CONCLUSION

See Analysis.

OPINION

ANALYSIS

The Board of Directors of an irrigation district has the power to acquire water rights for their district. This power is granted by Section 75-22-12 and 75-26-3 of the New Mexico Statutes Annotated (1953).

Section 75-22-12 provides that the Board of Directors has the power to acquire water rights when such rights are necessary for the use of the district. Section 75-26-3 grants an even broader power. This section provides that the directors of an irrigation district "have power to purchase, hold, use, control, operate, sell, convey, lease and otherwise acquire and deal in . . . water rights . . . whenever, in their judgment such action shall be for the benefit of the district."

While these sections make it clear that irrigation districts can acquire water rights there is no provision for "holding" the rights acquired without putting them to beneficial use. A water right is a usufructary right which, under the laws of New Mexico, can be forfeited by non-use. The constitution of New Mexico, Article XVI s. 3 provides that beneficial **use** shall be the basis, the measure and the limit of the right to the use of water. There is, therefore, no power under New Mexico water law to legally acquire a water right and hold it without using it.

It therefore follows, that an irrigation district must continue to beneficially use any water right acquired under authority of Sections 75-22-12 or 75-26-3 or suffer the right to be forfeited.

In addition to the power to acquire water rights Section 75-22-12 also makes this grant:

"The Board of Directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other lands within or without the said district . . . Provided, no vested or prescriptive rights to the use of such water shall attach to said land by virtue of such lease or such rental . . ."

This language in Section 75-22-12 must mean that a water right acquired by an irrigation district will not be lost by forfeiture if the water to which the district is entitled by virtue of such right is leased or rented and therefore used upon land other than the land to which the right may have been appurtenant. In other words, the leasing or renting of the water, together with the use thereof by the lessee, is a beneficial use within the constitutional requirement.

The complete answer to your question, therefore, appears to be that an irrigation district certainly has the power to acquire water rights by any legal means. These rights can be held in a "rental account" only in the sense that the water which these rights entitle the district to use may be used on lands other than those to which the water right is appurtenant. The length of time, however, that the district may hold a right, without putting the water of that right to beneficial use is limited. If the water of a particular right is not beneficially used within four years of the date on which the right is acquired then the right is subject to forfeiture. See § 75-2-26, N.M.S.A. (Supp. 1963). In the discretion of the State Engineer, however, extensions of time may be granted beyond the four year period. See § 75-11-8, N.M.S.A. (Supp. 1963).

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