

Opinion No. 67-47

March 16, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Jose Benito Chavez State Representative Legislative-Executive Building
Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Is a community ditch or acequia a property of the community?
2. May a property owner, who uses water from the ditch, stop improvements on the ditch even though he may be in the minority for improvements?
3. Do commissioners have the right or power to levy assessment for the improvement of the ditch.
4. May the commissioners collect delinquent payments from the property owner, which the commissioners have been unable to collect for more than five or more years? The commission levied the assessment for improvement of the ditch, but the property owner being in disagreement with the commissioners refuses to pay.
5. Could a property owner lose his water rights for not paying his assessment for the improvement of the community ditch?

CONCLUSIONS

1. See Analysis.
2. No.
3. Yes.
4. See Analysis.
5. See Analysis.

OPINION

{*61} ANALYSIS

A community ditch is the property of the persons who may have completed the ditch. See Section 75-14-7, N.M.S.A., 1953 Compilation. Therefore, the answer to your first question depends on what community you have reference to.

We believe Section 75-14-53 N.M.S.A., 1953 Compilation holds the answer to your second question. This section provides as follows:

"CHANGE IN LOCATION, EXTENSION, OR RECONSTRUCTION OF DITCH CONSENT OF WATER USERS -- EXPENSE. -- The commissioners of any community ditch may alter, change the location of, enlarge, extend, or reconstruct such ditch for the purpose of providing greater efficiency in irrigation to the water users of said ditch, or when any part thereof shall have been destroyed by rain or in any other manner, or for the purpose of increasing the cultivable area, Provided that such alteration, change or location, enlargement extension or reconstruction shall be affected (sic) only upon the consent in writing of a majority of the water users of said community ditch, filed with such commissioners, such majority to be determined by the same rule as applies to the election of commissioners of the acequia, and Provided that such alteration change of location, enlargement or extension shall in no wise impair the rights of prior water users from said community ditch, and Provided further that the expense incurred in any such alteration, change of location, enlargement or extension shall be borne pro rata by those beneficially interested in same."

This section makes it clear that if the majority of the water users desire that the actions noted in this section be taken, one person cannot stop them and he must pay his pro rata share. We believe the item listed in this section can be called improvements.

As just noted, all water users must bear their pro rata share of the improvements. Under Section 75-14-21 N.M.S.A., 1953 Compilation, the commissioners have the power to assess fatigue work or tasks as money in lieu thereof. This would include the improvements contemplated in Section 75-14-53, supra.

Until Section 75-14-24.1 N.M.S.A., 1953 Compilation (P.S.) was enacted in 1963 the only remedy for collection of assessments levied under Section 75-14-21, supra, was the deprivation of the delinquent party's right to the use of water. **La Acequia de San Rafael del Guique v. Lopez**, 72 N.M. 349. The commissioners still have the power under Section 75-14-24 N.M.S.A., 1953 Compilation to stop the use of water by one in default. Now, however, by virtue of Section 75-14-24.1 the mayordomo or superintendent {62} of an acequia or ditch may bring a civil action to recover the amounts assessed. We have not found a statute of limitations that would bar the claim against the delinquent water user. However, we do not believe a court action can be maintained under Section 75-14-24.1 for assessments made prior to the enactment of that section. Any assessment due prior to that time will have to be collected by refusing the use of the water to the delinquent user.

In answer to your last question, it is our opinion that the water rights of an owner in a community ditch are subject to the forfeiture provisions of Section 75-5-26 N.M.S.A., 1953 Compilation (P.S.). This section provides in part as follows:

"FAILURE TO USE WATER -- FORFEITURE. -- A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as unappropriated public water; Provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent effectors of the owner; and Provided that periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation program provided by the Soil Bank Act shall not be computed as part of the four-year forfeiture period. Provided further that the condition of notice and declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965."

In our opinion the failure to use the water because of the failure to pay an assessment would not constitute circumstances beyond the control of the water right owner.

All of your questions have been answered in light of Article 14 of Chapter 75 of the New Mexico Statutes Annotated, Article 15 of Chapter 75 also applies to community ditches or acequias but not to the ones in the counties of Dona Ana, Grant, Otero, Luna, Lincoln, Chaves, Eddy, Santa Fe, Guadalupe, Colfax, Union, Rio Arriba, San Juan, Quay, McKinley and Roosevelt. See Section 75-15-10 N.M.S.A., 1953 Compilation.

By: Roy G. Hill

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