

## Opinion No. 69-96

August 15, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,  
Assistant Attorney General

**TO:** Board of County Commissioners, Taos County, County Court House, Taos, New  
Mexico

### QUESTIONS

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1. Do community ditch commissioners have the right to take private property for just compensation under the power of eminent domain?
2. Do they have the same right with regard to public property?
3. By what method may property be taken by the ditch commissioners.

#### CONCLUSIONS

1. Yes.
2. No, but see analysis.
3. See analysis.

### OPINION

#### {\*152} ANALYSIS

Community ditches are political subdivision of the State of New Mexico. Section 75-14-25.1, N.M.S.A., 1953 Comp., as such, under the power of eminent domain they may condemn land for the construction of ditches. Section 75-1-3, N.M.S.A., 1953 Comp. There is no question that private property cannot be taken for a ditch without payment of just compensation. New Mexico Constitution Article II, Section 20.

In answer to question number three, it would appear there are at least two methods for such condemnation proceedings of the New Mexico Statutes. If the condemnation is for a new ditch the proceedings is conducted by a probate judge of the county is an extremely simplified procedure. Section 75-14-12, N.M.S.A., 1953 Comp. If the condemnation involves a change of location, alteration, enlargement, extension or reconstruction of a ditch, the condemnation procedure is handled by a magistrate court. Section 75-14-53 to 50. See also Section 36-1-38, N.M.S.A., 1953 Comp. (1968 Supp.).

These specific statutes on condemnation of a ditch control over the more general condemnation statute for water facilities found in Section 75-1-3, N.M.S.A., 1953 Comp., which incorporates §§ 22-9-1, et seq, by reference. **Barney v. City of Albuquerque**, 40 N.M. 90, 55 P.2d 40 (1936). In any event, it is clear that the commissioners do not condemn land by the filing of a declaration of water rights under Section 75-1-2.1.

The question of how much land can be taken for public use on either side of the ditch when either building a new ditch or enlarging or extending a ditch would be a question which would have to be decided in an individual condemnation suit. The burden, or course, would be on the ditch commissioners to prove the public necessity for the taking. **Board of County Comm'rs v. Sykes**, 74 N.M. 435, 394 P.2d 278 (1964). Finally, in the event that the ditch commissioners were to take the land without initiating condemnation proceedings, the land owner may institute his own suit for inverse condemnation and receive just compensation for the taking. **Garver v. Public Serv. Co.**, 77 N.M. 262, 421 P.2d 788 (1966).

Your second question is probably too general for a complete answer from this office. It is possible that a court, given a particular set of facts, could find that the commissioners had an implied power to condemn public property. {\*153} Our answer must, of necessity, be directed to general principles.

In **City of Albuquerque v. Garcia**, 17 N.M. 445, 130 P. 118 (1913), the Supreme Court held that one public body could not take property already committed to a public use without specific statutory authority. The court, in so holding, rejected the City's contention that Laws 1905, Ch. 97 (now codified as §§ 22-9-1, et seq., N.M.S.A., 1953 Comp.) and Laws 1891, Ch. 3, § 1 (the predecessor of § 41-17-8, N.M.S.A., 1953 Comp.) granted such specific authority.

As previously noted, the power of eminent domain for the taking of land for water structures is found in § 75-1-3, N.M.S.A., 1953 Comp. Although the section recites that such structures should be located so as to do the least damage to private **or public property** the statutes does not specifically authorize the condemnation of public property. In comparing § 75-1-3 with the statutes construed in **Garcia, supra**, we cannot say that the legislature intended that the ditch commissioners have the power to condemn public property.

New Mexico apparently follows the general rule in this area. See, **State ex rel State Highway Comm'n v. Board of County Comm'rs**, 72 N.M. 86, 380 P.2d 830 (1963); 1 Nichols, Eminent Domain § 2.2 (3rd ed. Rev.).

Nichols, in his treatise indicates that possibly a broader interpretation should be applied. He says that:

". . . where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied

unless the legislature has authorized the acquisition either expressly or by necessary implication. Such as acquisition cannot be effected under a general delegation of the power of eminent domain from the legislature, unless it can be clearly inferred from the nature and situation of the proposed work, and from the impracticability of constructing it without encroaching on land already used by the public, that the legislature intended to authorize such property to be taken."

It is conceivable that under certain circumstances a court could find that, inferring "from the nature and situation of the proposed work, and from the impracticability of constructing it without encroaching on land already used by the public," the legislature granted the ditch commissioners authority to take public property under power of eminent domain.

Therefore, we will qualify our answer to question number two in order to alert you to the possibility of a court holding "yes" in a given situation.

You also asked in your letter of May 22, 1969 about the creation of water rights by the filing of a declaration under Section 75-2-1, N.M.S.A., 1953 Compilation. By its terms this statute does not resolve any question of water rights between water users and merely is a recitation of facts contained in a sworn statement. This office cannot answer questions regarding the conflicting rights of water users as that matter must be handled by the parties either through litigation or other means.