

## Opinion No. 72-26

June 8, 1972

**BY:** OPINION OF DAVID L. NORVELL, Attorney General James H. Russell, Jr.,  
Assistant Attorney General

**TO:** Mr. Wayne P. Cunningham, Treasurer-Manager, Elephant Butte Irrigation District,  
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### QUESTIONS

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1. Is an irrigation district authorized to construct wells in order to provide supplemental water supplies to certain water users within the district?
2. May such a district separately assess the users of such supplemental water, apart from other irrigation charges?

#### CONCLUSIONS

1. Yes.
2. Yes.

### OPINION

#### {\*44} ANALYSIS

The Elephant Butte Irrigation District is an irrigation district organized for cooperation with the United States under reclamation law. The powers of the Board of Directors of such a district are set out in Section 75-23-14, N.M.S.A., 1953 Comp., which states, in material part:

"The said board shall have the power, in addition to the means to supply water to said district, to construct, acquire or purchase any and all canals, ditches, reservoir sites, water, water rights, rights of way, or other property necessary for the use of the district. In case of the purchase of any property by said district, the bonds of the district hereinafter provided for may be used at their pay value in payment, without previous offer of such bonds for sale.

{\*45} "All waters distributed shall be apportioned to each landowner or entryman pro rata to the lands assessed under this act within such district. The board of directors shall have the power to lease or rent the use of water or electrical energy, or contract for the delivery thereof to occupants of other lands or municipalities within or without the

said district at such prices and such terms as they deem best, for district lands. 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. And, Provided further, no rules shall be prescribed or regulations enforced which shall interfere with the vested rights of any water user or with the exercise of such rights of any such water user."

This statute contemplates the construction and operation of water supply, storage, and diversion works by a cooperating irrigation district. It grants to the board of directors a board discretion to decide which, if any, such projects are "necessary for the use of the district" and authorizes the board to fix and collect rentals for water delivered to the owners of land "within or without the said district." Such contracts for the delivery of water are, of course, distinct from reimbursement contracts with the U.S. Bureau of Reclamation, under which the cooperating districts, as agent or trustee for its constituent landowners, promises to repay part or all of the cost of construction and operation and maintenance of a federal reclamation project, and pursuant to which the cooperating district levies and collects annual assessments on all beneficiaries of a reclamation project. The requirement of this law (Section 75-23-14) that the board of directors may lease or rent the use of water "at such prices and such terms as they deem best" gives ample authority to the board to enter into contracts for the rental or lease of water supplies made available by the construction of water works pursuant to the same statute, and for the recovery in the rental price of the initial construction cost of the project, spread over a reasonable period of time, together with the reimbursement of cost of operation and maintenance. Of course, these rental contracts will not give rise to any extra-contractual property right in the users, either in respect to the right to divert and use such waters, or in respect to ownership of the diversion or distribution works.

It is important to distinguish the subject situation from that contemplated by Section 75-24-13, N.M.S.A., 1953 Comp. That section provides for the creation of local improvement districts within cooperating irrigation districts by the owners of certain lands seeking "any desired special construction, reconstruction, betterment or improvement in an irrigation system, including drainage (and protection from arroyo floods or encroachment from arroyo fans, river rectification and control, river bank protection, construction of levees and jetties), which are for the special benefit of certain agricultural lands tributary thereto . . ." The local improvement district mechanism is designed to allow a group of landowners within a cooperating irrigation district, who have a common concern with localized flood danger or a common desire for irrigation system improvements arising out of a particular geographical situation, to form a local district with power of special assessment for the construction and operation of a proposed improvement. The need for supplemental underground water supply, as indicated in your letter, does not appear to arise out of any special geographical circumstance confined to a particular locality within the Elephant Butte Irrigation District, but appears rather to be a generalized concern of those landowners scattered throughout the district who lack private supplemental irrigation wells. It is doubtful, therefore, whether the device of a local improvement district is appropriate for defraying the cost of construction and operation of the supplemental wells which the district desires to drill. In any event, the local improvement district statute is permissive, and not

mandatory, and therefore would not, even were it otherwise applicable, serve to deprive the board of directors of their discretion to proceed under Section 75-23-14, **supra**.

It must follow from this analysis that the district may, by appropriate contractual provision, require those persons (and **only** those persons) renting or leasing water from the district to pay {*\*46*} an annual charge reasonably calculated to reimburse the district for its costs of construction and operation and maintenance of supplemental wells, separate from the annual assessments levied and collected under other provisions of the laws governing irrigation districts cooperating with the United States.