

Opinion No. 73-23

February 22, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Robert Jordan New Mexico State Representative Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

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In a declared underground water basin in which the State Engineer has declared there is no unappropriated water, may the State Engineer approve an application for a new appropriation for any purpose?

CONCLUSION

See analysis.

OPINION

{*38} ANALYSIS

It must be noted initially that there is no statutory authority for the State Engineer to "declare" that no unappropriated water exists in an underground basin. Under present law the State Engineer must, and does, determine whether unappropriated water exists on a case by case basis, and we will, therefore, discuss your question in that light.

Section 75-11-3, N.M.S.A., 1953 Comp. (P.S.) provides that the State Engineer may grant an application and issue a permit to an applicant to appropriate all or a part of the water applied for, subject to the rights of all prior appropriators, "if he finds that there are in the underground stream, channel, artesian basin, reservoir or lake unappropriated waters or that the proposed appropriation would not impair existing water rights from the source"

Thus, in an underground basis or reservoir, the boundaries of which have been duly declared by the State Engineer to be reasonably ascertainable pursuant to Section 75-11-1, N.M.S.A., 1953 Comp., the State Engineer may authorize a new appropriation only if he finds that unappropriated water exists or {*39} that the proposed appropriation would not impair existing water rights.

Our State Supreme Court has held that each time an application for a permit to appropriate underground water is lodged before the State Engineer, that official has the duty to consider all prior appropriations to determine whether or not there are

unappropriated waters. The burden is upon the applicant to demonstrate that unappropriated water exists or that no impairment of existing rights would be caused. **Spencer v. Bliss**, 60 N.M. 16, 287 P.2d 221; **In re Hobson**, 64 N.M. 462, 330 P.2d 547; **Heine v. Reynolds**, 69 N.M. 398, 367 P.2d 708; **Mathers v. Texaco**, 77 N.M. 239, 421 P.2d 771.

Accordingly, in the situation your question poses, if there is a determination by the State Engineer that no unappropriated water exists to satisfy the proposed new appropriation, he must deny the application unless he finds that no impairment would be caused to existing water rights from approval of the application. While no unappropriated water exists in an underground reservoir, an application for a new appropriation must nevertheless be approved provided that it involves a non-consumptive use of water, i.e., one that causes no net depletion of water in the reservoir and, therefore, does not impair existing rights. **Reynolds v. Wiggins**, 74 N.M. 670, 397 P.2d 469.

The answer to your question then is that with respect to any proposed new appropriation for which application is made under Section 75-11-3, **supra**, and where the State Engineer determines no unappropriated water exists, the new application is to be denied except where and to the extent that he finds the proposed new appropriation would not impair existing water rights.

By: Oliver E. Payne

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