

## Opinion No. 73-36

April 11, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. J. Lee Cathey District Attorney Fifth Judicial District P.O. Box 875 Carlsbad, New Mexico 88220

### QUESTIONS

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1. Can the Board of County Commissioners of Chaves County create a new flood district and incorporate within it the existing flood districts?
2. Can the Board of County Commissioners of Chaves County include within a flood district all lands within five miles of the major river and also lands within five miles of all tributaries, draws and arroyos which are certified as contributing to the flood conditions on the major river, on its tributaries, and the draws and arroyos, all of which are destructive to property and dangerous to human life?

#### CONCLUSION

1. Yes.
2. Yes.

#### FACTS

Pursuant to the authority of Section 15-50-10, N.M.S.A., 1953 Comp., the Board of County Commissioners of Chaves County has created two emergency flood districts. Within these areas are draws, arroyos and tributary streams which contribute to flood conditions. The Board now desires to create a new flood district into which the two existing flood districts would be incorporated. To carry out the flood control measures deemed necessary, the proposed district would include all land within five miles of the Pecos River and its tributaries, and the arroyos and draws which contribute to the flood conditions in the Pecos River, its tributaries, arroyos and draws.

### OPINION

#### {\*72} ANALYSIS

1. The creation of emergency flood districts is provided for in Section 15-50-10, **supra**, which reads as follows:

**"Emergency flood districts -- Establishment.** -- Each county of the state through which runs any river, stream or arroyo subject to flood conditions destructive to property or dangerous to human life shall be by the board of county commissioners, within thirty [30] days after the passage and approval of this act [15-50-10 to 15-50-17], divided into emergency flood districts, and said board shall set out the limits and boundaries of each said district, and cause the same to be properly numbered so that the same may be known and identified."

This provision confers upon the Boards of County Commissioners the authority to designate the limits and boundaries of emergency flood districts to be established within each county ". . . through which runs any river, stream or arroyo subject to flood conditions destructive to property or dangerous to human life . . ." The only apparent limitation on the authority of the Board of County Commissioners to designate such limits and boundaries as may be warranted from time to time by new and changing circumstances is the specification in Section 15-50-10, **supra**, that emergency flood districts shall be established ". . . within thirty [30] days after the passage and approval of . . ." Chapter 169, N.M. Laws 1929. This specification, however, is merely a directive to the county commissioners to establish flood district boundaries expeditiously, and it should not, in view of the purpose of the legislation, be construed to be a limitation on the authority of the county commissioners to redefine such districts as circumstances warrant. The essence of the thing to be done pursuant to the legislation is the establishment of flood districts in a manner {73} which will most effectively prevent destruction of human life or property during flood conditions. This purpose would not be served if the thirty-day specification were construed to limit the authority of the county commissioners to redesignate flood district boundaries as circumstances warrant. See **State ex rel. Sun Co. v. Vigil**, 74 N.M. 766, 398 P.2d 987 (1965). Statutes are to be construed in the most beneficial way of which their language is susceptible in order to achieve that statutory purpose and prevent prejudice to the public interest. Thus the thirty-day specification in Section 15-50-10, **supra**, should not be regarded as a limitation on the authority of county commissioners to re-define emergency flood district boundaries. See **City Commission of Albuquerque v. State ex rel. Nichols**, 75 N.M. 438, 405 P.2d 924 (1965).

2. Section 15-50-2, N.M.S.A., 1953 Comp. provides for an annual levy on all taxable property located within 5 miles of both sides of a river or stream. The question is whether an arroyo or draw may be considered a river or stream so as to make all land within 5 miles of the arroyo or draw taxable by the flood commissioner.

The following definitions indicate that an arroyo or draw can also be considered as a stream and, therefore, all land within 5 miles of an arroyo or draw should be included in the definition.

"A 'stream' is a water course having a source and terminus, banks and channel, through which flow, **at least periodically** and usually empty into other streams, lakes, or the ocean, and it does not lose its character by breaking up and disappearing." (Emphasis

added) **Southern Pacific Co. v. Proebstel**, 61 Ariz. 412, 150 P.2d 81 (1944); **Mogle v. Moore**, 16 C.2d 1, 104 P.2d 785 (1940).

"The word 'draw' as used in the Northwestern States, implies a depression which may run for many miles in length, in which there is not necessarily a running stream, but the waters from melting snows and rains which fall on the area, on either side of the draw drain into it, and thence make their way, through other channels, to the broad rivers of the west." **Lincoln & B.H.R. Co. v. Southerland**, 44 Neb. 526, 62 N.W. 859 (1895).

"'Arroyo' may be defined as a water course, a creek, or brook; also a small, often dry, gully or channel carved by water." **Albuquerque Gravel Products Co. v. The American Emp. Ins. Steel**, 282 F.2d 218 (10th Cir. 1960).

Therefore, the area within 5 miles of the arroyo or draw may be taxed by the flood commissioner.

By: Oliver E. Payne

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