

Opinion No. 74-23

July 2, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Bobby Duran State Representative-District 42 P.O. Box 1684 Taos, New Mexico 87571

QUESTIONS

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Does the law require that acequia organizations distribute their available water supply as nearly as practicable in proportion to the lands with water rights owned by each member of the ditch?

CONCLUSION

See analysis.

OPINION

{*44} ANALYSIS

Sections 75-14-1 through 75-14-61, NMSA, 1953 Comp. and Sections 75-15-1 through 75-15-10, NMSA, 1953 Comp. deal with ditches and acequias and govern acequia and community ditch associations. With regard to apportionment of water among the ditch owners, Section 75-14-21, **supra** provides in part:

"Commissioners -- Powers and duties -- Expenses -- Contracts -- Fatigue work {*45} -- Rules and regulations -- Duties of mayordomo. --

. . .

The mayordomo or superintendent shall, under the direction of said commissioners, be the executive officer of said ditch, and have the superintendence of all work thereon and the distribution of the waters thereof, with the collection of fines, if any, and of amounts to be paid in lieu of fatigue or task work, and shall perform such other duties in connection with said ditch as may be prescribed by the rules and regulations of the same, or as may be directed by the commissioners" (Emphasis added.)

Section 75-15-4, **supra** provides:

"Duties of officers -- Work assessments -- Collection and disbursement of moneys -- Reports -- Records. --

. . .

The mayordomo or superintendent shall be the executive officer of said ditch and have the superintendence of all work thereon and of the distribution of the waters thereof, with the collection of fines, if any, and of the amounts to be paid in lieu of fatigue or task work:" (Emphasis added.)

There is no provision within these sections specifically designating the manner in which the mayordomo is to apportion the water. However, the New Mexico Constitution provides the mandate for use of all water within this state. Article XVI, Section 3 of the Constitution states:

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

See also Section 75-1-2, NMSA, 1953 Comp. Thus, the mayordomo must distribute the acqua water according to beneficial use by the ditch owners. Beneficial use of water is to be determined by the ultimate use to which the water is put rather than by distribution of the water among the people. **W.S. Ranch Co. v. Kaiser Steel Corp.**, 388 F.2d 257 (10th Cir. 1967). Determination of beneficial use will necessarily depend to an extent on the proportionate lands with water rights of the ditch owners.

Although acreage with water rights is not mentioned in the statutes dealing with water rights as the method of water apportionment, many sections imply that this is the primary factor in apportionment since other rights are so apportioned.

For example, Section 75-14-14, NMSA, 1953 Comp. provides that:

". . . votes . . . shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights."

Attorney General Opinion No. 3210, dated December 10, 1921 spoke of the interests of members of an acequia association:

"Each Acequia or community ditch has some unit of measurement by which the interests of the various members of the community ditch are established and regulated. This unit should be used as the measure of the rights of each water user when he offers to vote.

If the unit of measurement is the number of inches of water allowed to each water user during the season, that standard should be applied to the right to vote. If the unit of measurement is the number of days labor required by each water user, that standard

should be applied. If the unit of measurement is the number of acres of land to which water is applied by each water user, that standard should be used."

Also Section 75-14-7, NMSA, 1953 Comp. requires that any person who is not an original ditch owner but who desires to use the waters of the acequia must pay a share proportionate to the {46} primary cost of the acequia to the amount of land proposed to be irrigated or the quantity of water proposed to be used. Section 75-14-31, NMSA, 1953 Comp. ties labor requirements to amount of land:

"All persons interested in a common ditch or acequia, be they owners or lessees, shall labor thereon in proportion to their land."

See Section 75-14-35, NMSA, 1953 Comp.

Furthermore, when apportioning waters among ditches which are constructed from and supply waters from the same source or river:

"The said apportionment and distribution of the water shall be made in accordance with the rights of each ditch, and in proportion to the lands irrigated by each ditch."

Section 75-14-46, NMSA, 1953 Comp.

Evidently the framers of the statutes relating to ditches and acequias assumed that water would be apportioned according to acreage irrigated plus other factors.

Snow v. Abalos, 18 N.M. 681, 140 P. 1044 (1914) discussed the history and character of community ditches, stating:

"It was made the duty of such overseers to superintend the repairs and excavations on such ditches, to apportion the persons or number of laborers to be furnished by the proprietors, to regulate them according to the quantity of land to be irrigated by each one from said ditch, to distribute and apportion the water in the proportion to which each was entitled, taking into consideration the nature of the seed, crops, and plants cultivated, and to conduct and carry on said distribution with justice and impartiality.

...

The distribution of the water and the repair of the ditch was in charge of a mayordomo, or officer elected by the water users under the ditch. This official would require the water users to contribute labor toward the repair of the ditch and its maintenance, and also distributed the water to the various irrigators equitably, in proportion to the land to be irrigated, as his necessities required.

...

He distributed the waters equitably to the several users, in proportion to the lands irrigated, taking into consideration the nature of the crops and quantity required. No one is entitled to waste water. When his requirements have been satisfied, he no longer has a right to the use of water, but must permit others to use it."

It appears that though the acreage of land with water rights is the controlling factor in apportioning water to members of the acequia association, the law does not prohibit the taking into consideration of other matters. See **Holmberg v. Bradford**, 56. N.M. 401, 244 P.2d 785 (1952). However, these other matters must be factors in determining **need** or **beneficial use**.

For example, acequia officials, in determining their schedules for rotation of water rights among the owners of water rights, must take into account such legitimate practical considerations as the relative physical location of irrigated lands, the varying water demands of different crops, the need to minimize conveyance losses, etc., within the framework of a general allocation system geared to each water user's proportionate interest in the acequia.

Therefore, it is our conclusion that the law requires that acequia organizations distribute their water supply as nearly as **practicable** in proportion to the lands with water rights owned by the members of the acequia. This, of course, the mayordomo accomplishes with absolute impartiality.

By: Jane E. Pendleton

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