

Opinion No. 14-1326

September 17, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Mr. Lee B. Chase, Oscuro, New Mexico.

WATER.

Prior water rights.

OPINION

{*186} I have just received your letter asking where you can procure a copy of the opinions of this office, and I take pleasure in sending you, under other covers, the two volumes which have thus far been published. I think that the only reference to the particular question about which you ask is to be found at page 59 of the earlier volume. You say that you want an opinion as soon as possible as to the granting of a water right to the person who had a prior right under former law, as it is a mooted question whether it is necessary to apply for formal permit under such circumstances.

You will see in the opinion above referred to that it might be the duty of the engineer, when an application is made to him for the right to appropriate water, in order to know whether there is or not unappropriated water, to decide whether the earlier rights are valid and still control the water or not.

Section 59 of Chapter 49 of the Laws of 1907 distinctly declares that nothing contained in the act shall be construed to impair existing vested rights or the rights and priorities of any person, firm, association or corporation who may have commenced the construction of irrigation works, or who filed application, affidavit or notice for the purpose of appropriating for beneficial use any of the waters defined in Section 1 of the act, in accordance with the laws of the territory prior to the passage of the new act. The first clause of this section is only declaratory of what would be the law without any legislation, as it would be beyond the power of the legislature to impair existing vested rights which are property and which, therefore, cannot be taken without compensation. If the earlier right, which you have in mind, has been fully consummated by compliance with former statutes and actual appropriation for beneficial use, certainly there can be no need of any new action by the state engineer under the later statute. If, however, the earlier right has not been fully vested by compliance with laws and the actual beneficial {*187} use of the water, it might be desirable to have the inchoate right recognized through application to the state engineer and his approval thereof, in order to avoid complications and disputes. In such a case I would recommend that in making the application there should be a distinct statement of the reservation by the applicant of his earlier right so that it could not appear that he had in any way waived any right that he might have.