

Opinion No. 15-1506

April 23, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Hon. James A. French, State Engineer, Santa Fe, New Mex.

As to approval of application for water from the Rio Grande or its tributaries by the state engineer.

OPINION

{*90} I have before me your letter of even date herewith in which you inform me that the Arlington Land Company on March 2, 1915, filed applications numbers 919, 920, 921, 923, 928 and 929 to appropriate water from the Chama and Brazos Rivers, Rock Lake and Chaves creeks and tributaries, upon which publication notice was ordered and date set for consideration was April 21, 1915. You further {*91} say that on March 19, 1915, the District Engineer of the United States Reclamation Service was advised of these filings by letter from your office and on March 22, 1915, Mr. P. W. Dent, district counsel for the Reclamation Service, replied in substance, that the question of action to be taken by the United States would be given consideration and your office advised, and on April 21, 1915, Mr. Dent advised you by long distance telephone that a notice was being mailed in this connection which was received and filed yesterday, being a copy of a letter written the Arlington Land Company by Mr. F. M. Lawson, Project Manager.

Upon this you ask whether, in the absence of any protest as required by the regulations of your office, you should approve the applications of the Arlington Land Company with the general proviso that they be subject to prior valid rights, and if you have such a right, on what grounds?

I am unable to see why any distinction should be made between the government reclamation service and other persons in the practice as to passing upon applications to appropriate waters. In the present case the Reclamation Service has been fully advised, in effect refuses to make any protest as required by your regulations, and notifies the Arlington Land Company, in substance, that if it takes any water to which the Rio Grande project is entitled and which is required for said project, resistance will be made by the United States and anything necessary will be done to protect the rights and interests of the government and of the water users under the Rio Grande project. In other words, instead of making any resistance before your office, a threat is made to the Arlington Land Company of possible serious litigation at some time in the future. If the Arlington Land Company is willing to assume the risk of any such threatened trouble, I can see no good reason why you should not approve its applications. It is true that the statute in Section 40 of Chapter 49 of the Laws of 1907 declares that waters as to which notice has been given to the engineer that the United States intends to utilize them, shall not be subject to a further appropriation, but when the representatives of the

United States decline to make any resistance to action in your office, I do not see that this section can, of its own force, take the place of the protest required by your regulations.