Opinion No. 15-1508

April 28, 1915

BY: H. S. BOWMAN, Assistant Attorney General

TO: Hon. James A. French, State Engineer, Santa Fe, N. M.

As to rights of appropriators of waters upon application to state engineer.

OPINION

*{*92}* Referring to the matters concerning which the Attorney General wrote you on March 31, I have to say that by his direction, I have made some investigation relative thereto, and submit the following as the result thereof.

The questions involved arise upon an inquiry from the office of the State Engineer concerning the right of an applicant for the appropriation of waters for irrigation purposes, to acquire by eminent domain proceedings a right to the use of the project and the acquiring of a right of way through an existing ditch or canal of another appropriator by enlargement thereof. The inquiry involves the right of Mr. J. D. Hand, and his assignees, under application No. 331, to enlarge by condemnation proceedings as much of the existing project and the canal of the La Cueva Ranch Company as may be necessary to enjoy the use of the water applied for in the application, the project of the La Cueva Ranch Company having been constructed and in use prior to the enactment of Chapter 49 of the Laws of 1907, Section 3 of which specifically grants the right to enlarge existing structures and to use them in common with the former owner. No formal protest to the granting of application No. 331 was filed by protestant, the protest being directed to application No. 361 wherein the use of the same structures and canals and the solution of the same problems are involved.

It is the contention of the La Cueva Company that the application for the use of the water and the consequent enlargement of the structures of the company is based upon said Section 3 of Chapter 49 of the Laws of 1907, and that this part of the section authorizing *{*93}* the enlargement of existing structures is not applicable to structures, etcetera, secured by statute prior to the enactment of the law mentioned.

Section 3 of Chapter 49, Laws 1907, in so far as same is here concerned, reads as follows:

"The United States, the Territory of New Mexico, or any person, firm, association or corporation may exercise the right of eminent domain to acquire land and right of way for the construction of irrigation works for the storage or conveyance of water for beneficial use including the right to enlarge existing structures, and to use the same in common with the former owner."

Even though the granting of the application in this case were entirely dependent upon the authority of Section 3 of Chapter 49 of the Laws of 1907, I do not consider the position of the protestant to be tenable. The rule contended for would result in the monopolizing of the beneficial use of waters by appropriators whose rights are based upon statutes enacted prior to the law of 1907, where it would not be feasible or possible to divert the water except through the means employed by the prior appropriator, it mattered not how small a quantity of water his application grants him as compared with the total quantity of water subject to beneficial use. Under such conditions an appropriator of a small quantity of water could prevent the use of the balance of the water even though there were great quantities thereof which would otherwise be available. The prior appropriator acquires a vested right only to that much of the water which he is granted by virtue of his application and which he applies to a beneficial use and the balance is subject to the public demand under the proper regulations provided for by law. Can the appropriator whose project is constructed under a law enacted prior to the act of 1907 thus prevent the application of water to beneficial uses in a country where water for irrigating purposes is as necessary as it is in New Mexico, simply because he has by priority of diversion and application to use availed himself of the only manner of diverting a part of the water to his use? As a general proposition, we should answer in the negative. And we believe this position is sustained by the provisions of the Constitution of New Mexico relating to the subject of irrigation and water rights. Section 1 of Article XVI provides:

"All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed."

It will be noted that only those rights to the use of waters are recognized and confirmed in which the waters are applied to a useful or beneficial purpose. Rights to waters not used for such purposes, if there are any such rights, are not recognized or confirmed. Now let us refer to the next section of the same act for the provision governing the disposition of waters not used for useful or beneficial purposes. Section 2 reads:

"The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby *{*94}* declared to belong to the public and to be subject to appropriation for beneficial use in accordance with the laws of the State. Prior appropriation shall give the better right."

Herein it is provided that the unappropriated waters, that is, those not already applied to a useful or beneficial purpose, shall belong to the public and be subject to appropriation for beneficial use. The appropriation and use of surplus waters in our streams as provided for in the Constitution cannot be subverted by the mere fact that a part of the waters of a stream have been diverted by the only available means or methods.

Section 3 of the same article provides,

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

By limiting the right to the use of water to a "beneficial use," our Constitution grants to the appropriator only that quantity of water which is so applied, the remainder being subject to further appropriation for like purpose.

An appropriator acquires a vested right only to that quantity of water which he appropriates to a beneficial use, and he cannot be heard to complain if application is made for the use of the surplus water. But protestant says he does not object to the granting of the application for the use of the surplus water, but his objection is aimed at the manner in which the water will be diverted by the applicant, that is, through protestant's head-gate and canal, not denying that this is the only possible method by which the surplus water can be diverted. He says to the applicant, "You may have the surplus water if you can get it, but as I have the only possible channel through which this water can be diverted and as I built my project under a law which does not give you the right to use my head-gate and ditch, you cannot get the water out, and therefore are left with plenty of water but no way to get to it."

All of the arid land states of the west, with one exception, have a provision similar to that part of Section 3 of Chapter 49 of the Laws of 1907 granting the right to enlarge existing structures and to use them in common with the former owners, but so far as a careful examination of the cases has shown, no question has ever been raised as to the retroactive effect of those laws and, therefore, we get no light from other states upon this question. Nor has our own supreme court passed upon the proposition as yet, although this court did hold, in the case of Pueblo of Isleta vs. Tondre, et al., District Judge Leahy sitting for Supreme Court Justice Hanna, and Chief Justice Roberts dissenting, reported in 18 N.M. 388, 137 Pac. 86, that Chapter 49 of the Laws of 1907 does not regulate community acequias constructed prior to the passage of the act as to the right to change the point of diversion from the stream into such acequia. Whether the rule laid down in this case indicates what the holding would be upon a construction of that part of Section 3 of this chapter herein involved, is a query.

But it would seem to the writer that the question involved is disposed of by the very law under which the La Cueva Company's rights arise without any reference to Chapter 49 of the Laws of 1907, and this upon the theory that there is granted the right to *{*95}* use and enlarge the structures of an existing project, perfected by virtue of the powers granted by Chapter 12 of the Laws of 1887 (the act in force when the protestants' project was initiated and under the provisions of which it must be said that the protestant company was organized) by virtue of the general powers of eminent domain contained in the said act.

Chapter 12 of the Laws of 1887 (compiled as Sections 468 to 493 of the Compiled Laws of 1897) by Section 1 provides for the incorporation of companies:

"For the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses."

Section 17 of the act, Compiled Laws 1897, Section 484, provides for certain powers of corporations organized under the provisions of the act in addition to others previously granted, those pertinent to this discussion being Sub-section Fourth,

"To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in Section 468 of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any person except upon the payment of the assessed value thereof, to be ascertained as in this act provided; And provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted."

And, Sub-section Sixth,

"To enter upon and condemn and appropriate any lands, timber, stone, gravel or other material that may be necessary for the uses and purposes of said companies."

It would certainly appear that the language of Sub-section Fourth contemplates the use or the enlargement of existing structures, or both when it provides that the corporation organized under the act has the power to take and divert surplus water from any stream, lake or spring, so long as there is no interference with the rights of others, or the appropriation of their property, except upon the payment of the value thereof. The language "interference with the rights of others" would seem to indicate that it was intended to include the rights to the use of existing structures and ditches by others than the owners thereof, and that part of the section which provides for the payment of the value thereof furnishes the means by which the use of these rights can be obtained by compensating the owner therefor.

But even though the courts should not construe the statute discussed so as to grant the right to enlarge and use existing structures in accordance with the above opinion, still it is held by the authorities that under the general laws of eminent domain, the right to condemn a right of way through an existing ditch is consistent with the right to condemn property in the first instance for the construction of the ditch, where the use of the water is considered a *{*96}* public use. In Kinney on Irrigation, (2nd ed.), Section 1085, the rule is stated as follows:

"But whether the specific right (to condemn a right of way through existing ditches and canals and to enlarge the same where found necessary) is provided for by statute or not, it is generally recognized that the right exists under the general law of eminent domain, even in cases where the right of way for the existing ditch was originally acquired by condemnation proceedings. * * * And, therefore, it may be laid down as the general rule that, where the right to exercise the power of eminent domain exists at all for any use deemed by the Statute a public use, the right also exists to condemn a right of way through an existing ditch where there are no other obstacles in the way than the mere question of the right of eminent domain. * * * * Where the purpose for which the right is attempted to be exercised is deemed a public use * * * * upon principle, there is

no difference whether the right sought to be condemned is for a way over the land of another for a ditch or through an existing ditch or canal of another."

This was the holding in the case of Portneuf Irrigating Co. vs. Budge, 16 Idaho, 116, 100 Pac. 1046. The State of Idaho is the one arid land state which has no statute granting the right specifically, to enlarge and use existing structures for the purposes named.

Of course, the rule contemplates that the use to which the water will be applied will be a public one, but that the use of water for irrigating purposes is the application thereof to a public use is held in the Western arid land states without exception when the question has been raised.

The leading case upon the subject is Nash vs. Clark, 27 Utah, 158, 75 Pac. 371, 1 L.R.A. (N.S.) 208, later affirmed by the supreme court of the United States, 178 U.S. 361, 4 L. Ed. 1085, 25 Sup. Ct. Rep. 676. In this case the action was to condemn a right of way in a ditch owned by the defendant. The court upheld a statute providing that any person shall have a right of way across any private lands for the construction of necessary ditches and the enlargement of existing structures for conveying water for irrigation or drainage upon payment of just compensation therefor. In affirming the judgment of the supreme court of Utah, the supreme court of the United States says:

"Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon, or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state where the right of condemnation is asserted under a state statute, we are always where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation."

This case pushes the doctrine of the right to exercise the power of eminent domain for the benefit of a private individual further than it has ever before been pushed for the purpose of draining or irrigating private property.

*{*97}* To like effect see

Ellinghouse et al. vs. Taylor, 19 Mont. 462, 48 Pac. 757;

Helena vs. Rogan, 26 Mont. 452, 68 Pac. 798;

Butte A. & P. Co. vs. Montana Union Co., 16 Mont. 504, 41 Pac. 232, 31 L.R.A. 298, 50 Am. St. Rep. 508;

Dayton Gold & S. Mining Co. vs. Seawell, 11 Nev. 394;

Ouerman Silver Min. Co. vs. Corcoran, 15 Nev. 147;

Oury vs. Goodwin, 3 Ariz. 255, 26 Pac. 376;

Lewis County vs. Gordon, 20 Wash. 80, 54 Pac. 779;

Byrnes vs. Douglas, 27 C.C.A. 399, 48 U.S. App. 526, 83 Fed. 45;

Fallbrook Irr. District vs. Bradley, 164 U.S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56.

See also

Kansas & T. Coal R. Co. vs. Northwestern Coal & Min. Co., 161 Mo. 288, 61 S.W. 684, 51 L.R.A. 936, 84 Am. St. Rep. 717.

That the acquisition of an easement over land for the transportation to market of the logs of a private owner was not a public use justifying the exercise of eminent domain was held in Healy Lumber Co. vs. Morris, 33 Wash. 490, 74 Pac. 681, 63 L.R.A. 820, 99 Am. St. Rep. 964. And in Great Western Natural Gas & Oil Co. vs. Hawkins, 30 Ind. App., it was held that a right of way could not be condemned for a gas-pipe line unless the petitioner is engaged in furnishing gas for public use. But in these latter cases that "peculiar condition of the soil or climate, or other peculiarity of the State," which is made the basis for the holding in Nash vs Clark, supra, does not enter.

But we need go no further than the decisions of the supreme court of our own state for authority that the use of water for irrigating purposes is a public use of the water. It is so held in Land & Irrigation Co. vs. Gutierrez, 10 N.M. 177, 61 Pac. 357, and in this case it would seem that the court, in construing the act of 1887, granting the right to condemn property for irrigation purposes, held the powers granted under the act to be sufficiently broad to justify the condemnation of the use of existing structures and rights of way for irrigation purposes. The opinion says,

"It is difficult to see how the legislature could have conferred more complete powers upon such companies (organized for irrigating and drainage purposes) than it did by that act."

In addition to the cases heretofore cited holding that the use of water for irrigation purposes in the Western states is a public use, the following later cases are also much in point:

Prentice vs. McKay, 38 Mont. 115, 98 Pac. 1081;

Combs vs. Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966. In this case it was held that a ditch company carrying water for general purposes or irrigation could be compelled to furnish water to an actual **bona fide** consumer.

Salt Lake City vs. Gardner, 39 Utah, 30, 114 Pac. 147, in which it was held that when there were unappropriated waters more than sufficient to supply an appropriation

applied to a beneficial use by prior appropriators, application for the surplus waters should be *{*98}* granted though the withdrawal of the waters required might necessitate a change in the methods or means used by the prior appropriators to withdraw the water to which they were entitled so as to permit the use of the surplus and unappropriated water.

San Luis Land, Canal & Imp. Co. vs. Kenilworth Canal Co., 3 Colo. App. 210, 32 Pac. 860.

It might also be argued that the use of the project and the enlargement of protestant's ditch by applicant contemplates the actual condemnation of a part of the protestant's land itself, which would be necessary in the enlargement of the ditch, and we do not understand that protestant contends that this could not be legally done. In view of the foregoing, we are of the opinion that the La Cueva Company's protest, in so far as this one point is concerned, should be dismissed.

In this connection it might be well to consider the opinion rendered you by this office under date of September 23, 1913, in regard to the water of Palomas River unappropriated by the town of Palomas in which the following language is used:

"I find it impossible to accede to the view that this act can be so construed as to confer an absolute property right upon the people of Palomas in the waters of the Palomas River, to the exclusion of any other or different use than for the cultivated land of the said town of Palomas. It cannot be that the people of that town are given absolute ownership of the water to use or not, as they see fit, so that if they do not use it they can prevent the use of it by others and the development of the country by irrigation. They have had forty-five years, since the passage of the act, within which to utilize the waters of the stream without let or hindrance by any other person. If they have failed actually to use all of the water, they ought not to be allowed to say that no one else shall use it."

The views expressed in the present opinion coincide with those in the letter of September 23rd upon the general proposition that no absolute right is conferred upon appropriators of waters to the exclusion of others where there are waters subject to appropriation.

The written protest of the La Cueva Company in application No. 361 is returned to you herewith.