

Opinion No. 15-1491

March 31, 1915

BY: FRANK W. CLANCY, Attorney General

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

As to right of state engineer to approve an application for water by enlargement of works.

OPINION

{*71} I have had your letter of the 23rd inst. on my desk for some time, but have not been able sooner to give it attention. That letter relates to the condition of application No. 331 made by James D. Hand on August 6, 1909, upon which it seems that final action has not yet been taken. I understand from your letter that publication was ordered on the application on October 11, 1909, both in Spanish and English, and that on December 3, 1909, affidavits of publication were filed and thereafter protests were filed by H. Laumbach, J. M. Lucero, Eugenio Romero and J. W. Casias, which were considered at a hearing where it was agreed, I assume by the applicant, that the application, if approved, should be subject to their prior valid rights. Subsequently, in August of last year the rights under No. 331 were assigned to E. F. Shellaberger, who, at a recent hearing before your office, was represented by Mr. A. T. Rodgers. At that hearing Mr. Hugh Loudon appeared for the La Cueva Ranch Company and asked to present evidence, although he had not filed a protest, and a ruling was made that he had no standing at the hearing to present testimony, but you say that it is believed that your office, in rendering a decision, should not entirely disregard the La Cueva Ranch Company's contention, because the application is to enlarge the works of said company which were built and used long before the enactment of the present irrigation law of 1907, and have been in continuous use. You say that the company contends that no right exists under the statute to enlarge structures of the nature of theirs as set forth in detail in a protest filed against another application by the Placita Ranch Company No. 361, which proposes to enlarge the same works as No. 331, and is also assigned to Mr. Shellaberger.

Upon this statement you ask my opinion as to whether your office has a legal right to approve an application for water which contemplates the use of works by enlargement constructed and in use prior to the enactment of the law of 1907.

This involves the consideration of matters as to which I think there is considerable uncertainty. Section 3 of Chapter 49 of the Laws of 1907 declares that 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." A literal reading of this language would seem to make it applicable to all existing structures, whether existing at, before or {72} after the passage of the law of 1907, but I can see a line of argument against this which might be difficult to overcome. A person who might have constructed irrigation works prior to the passage of this law, and in conformity to all the requirements of pre-existing laws, could reasonably contend that he might never have entered upon the construction of such works if he could have foreseen that he might be subjected to any such interference as appears to be provided for in Section 3 of the act of 1907 and that he has such a vested property right in his completed irrigation works that it is beyond the power of the legislature to interfere with it.

On the other hand, it is established law of New Mexico that the unappropriated water of every natural stream belongs to the public and is subject to appropriation for beneficial use. If the preexisting irrigation works do not appropriate all of the water in a stream, may it not be with great force contended that that unappropriated water ought to be put to a beneficial use, and that under proper statutory regulations, any person or corporation should have the right to make use of it? Such person could not be allowed to enlarge the existing structures and to use the same in common with the former owner without making compensation, although there may be very serious practical difficulties in the way of ascertaining what compensation should be made.

I do not feel able to express any definite opinion on this subject without taking more time than I can give to the matter at present for a careful investigation as to what may have been done in other jurisdictions, but in view of some further statements in your letter, it may not be required at this time as it may be necessary for you to have some further proceedings and hearing. You say that it is found that the maps in connection with application No. 331 are not correct as to the location of the point of diversion and a section of the ditch line, although it is true that they were accepted by the former engineer and publication notice ordered and completed. You say that the view of your office is that you have the right to require that the maps and application be put in shape to accept before signing and that the applicant or his assigns should be required to reorder publication notice after they have complied. In this view it appears to me that you are quite correct if the changes in the maps and application are such as to make a material difference between them and the original maps and application. It is quite within the limits of possibility that persons who had no objection to the original application would make objections to the amended maps and application. If no substantial and material difference appears, I do not see that it would be necessary to insist upon a new publication.

As it seems probable that there will be some little further time consumed in your office upon this application, I will try to make such examination on the present subject of interference with existing irrigation structures and be prepared a little later to give you the result.

I return the application file of No. 331 which you sent to me with your letter.