

Opinion No. 15-1530

May 17, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Honorable James A. French, State Engineer, Santa Fe, New Mexico.

Upon the question of the authority of the state engineer to compel diversions of acequias to be changed to safer locations.

OPINION

{*115} I have had on my desk for sometime your letter, with which you enclose a typewritten copy of the opinion of the Supreme Court in the cases of the Pueblo of Isleta v. Tondre, et al., and J. A. Picard, et al., and have been somewhat at a loss, as a practical question, to know just what advice should be given.

You say that you wish to know, in the face of the decision of the court in the cases above referred to, which you say have been cited as upholding the contention that the State Engineer has no jurisdiction over community acequias or rights acquired prior to the initiation of the irrigation law, first, whether your office can compel such acequias to build head gates, designed and located so as to insure safety to the public; second, whether your office can compel diversions of said acequias to be changed to locations which are safer; and, third, whether, in cases where two or more diversions are a menace to the public safety and it is found that one diversion would suffice for two or more acequias, and one canal could {*116} be made a common carrier for two or more acequias to a point where the water could be taken from said common carrier into the other canals, your office could compel such common diversion to be made.

As I stated to you orally a few days ago, I am satisfied, as a practical question, that any such changes or control in community acequias as you speak of would much better be brought about by diplomatic negotiations in each particular case rather than by the assertion of positive authority and power. The people who own, manage and operate such community acequias are very jealous of any intrusion upon what they believe to be their rights, and while it might not be difficult to persuade them to make changes which would be for the safety of the public, yet it might bring about a great deal of friction and bad feeling, with possible long continued litigation, to attempt to drive them into doing what might be better for their own interests. An offer on your part to assist such communities by the contribution of engineering skill and plans might be readily accepted, when the giving of orders to do the same thing would produce vigorous and bitter opposition. Plausible objections might be made as to your doing some very desirable things because it might involve the taking of private property for public use, in which case compensation must be made as required by the Constitution.

My experience with these community acequias would lead me to believe that any attempt to try to get two or more acequia communities to unite in the use of one canal as a common carrier to a point where the water might be taken into the other canals, would meet with great opposition and would be repugnant to their feeling of property right that every community has in its own acequia, and distrust of any other community getting a foothold which would enable the new-comers to have any voice in the management and operation of what would be a sort of joint property.

Senate Bill No. 27, which was adopted by the last legislature, was clearly intended to put the work of public improvement on the Rio Grande, as fully as possible, in your hands and under your supervision, but no legislature could authorize you to interfere with pre-existing private rights, and wherever there is any such serious danger to the public safety as you apprehend I urge that you make every possible effort to adjust matters by persuasion rather than by any display of authority.

I return herewith the typewritten copy of the decision of the court in the Isleta case, which case you will find reported in Volume 17 of the New Mexico Reports, beginning at page 388.