

Opinion No. 16-1803

May 18, 1916

BY: FRANK W. CLANCY, Attorney General

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

Appropriation of flood waters by application to state engineer.

OPINION

{*366} I have had on my desk for several days your letter relative to the protest by J. L. Johnson against the granting of Application No. 973 made by M. H. Waller and Lewis Kennedy to appropriate the flood waters of the Tularosa Creek, together with a copy of the application, the transcript of testimony taken and a map. From what you say in your letter, which is confirmed by the testimony, the protestant's claim is based upon his alleged right to the flood waters of the stream which overflow his land and thereby increases the growth of grass thereon, the land being used for grazing purposes, and that his rights will be injured by the construction of the ditch proposed by the applicants, as it will decrease materially the flow over his land. It seems that the water flows naturally over Johnson's land without any effort on his part, needing no ditches or diversions, although the testimony indicates that in 1898 he did some work by filling up the channel so that the floods would spread over more of his land. Whether that which he then did and the subsequent use of the flood waters can be considered as amounting to an appropriation and application to beneficial use, does not seem entirely clear, but whether so or not, I am of opinion that he has some rights which your office will not be justified in disregarding in any action taken on the application No. 973.

It clearly appears, as you state in your letter, that it is evident that there are flood waters running to waste and the applicants are entitled to appropriate them under our general irrigation system, but I cannot see that it would be proper to permit the construction of any irrigation works by those applicants which would interfere with the use of the flood waters by Johnson to the extent {*367} to which he has actually used them, and I think this is equally clear whether it is put upon the ground of prior appropriation on his part or upon his rights as a riparian owner.

At the common law a riparian owner had the right to the undisturbed flow of a stream upon the banks of which his land lay, and such riparian rights are recognized even in the arid states of the Union, although with some necessary modifications on account of the paramount importance of the use of water for irrigation, which is clearly recognized in our legislation and also in Article XVI of the state Constitution. It necessarily follows that riparian rights cannot be said to exist in such a country as New Mexico to the full extent of their recognition and existence at the common law. The riparian owner, however, so far as he has any use for the water flowing in his stream. must not have that right impaired by appropriations of water made subsequent to his beginning the use

of the water so that what he requires will be materially diminished. The best cases that I have found on this subject are Miller v. Madera Canal Co. and Turner v. James Canal Company, which are reported in 22 L.R.A., N.S., at pages 391 and 401, respectively, and they harmonize with the views which I have hereinbefore very briefly expressed.

On the question of what may constitute prior appropriation of waters without compliance with statutory provisions on the subject, I invite your attention to my letter to you of July 11, 1914, which is printed beginning at page 131 of the last published report of this office.

There appears to be a practical difficulty in the present case as to providing for adequate protection of Johnson's rights on account of the claim that the applicants' proposed ditch would run through his land, which is alluvial in character, and might so wash it out that he could not get the same benefit from the overflow of flood waters as he has heretofore received. A practical question of this kind I cannot, of course, undertake to pass upon, and I assume that you can find some way of reaching a proper conclusion.

I return herewith the transcript of testimony, map and application.