

Opinion No. 33-588

April 24, 1933

BY: E. K. NEUMANN, QUINCY D. ADAMS,

TO: Hon. George M. Neel, State Engineer, Santa Fe, New Mexico.

{*42} This is in reply to your letter of April 18, 1933, concerning the application of Pete I. Grisak to appropriate certain public water of the State of New Mexico. I have examined your files in connection with this case and have read the protest of G. D. Boyd, Receiver for the Otero Investment Company. You wish to know whether or not, under all the circumstances, you have a right to entertain such application.

The protest, among other things, is based on the ground that the property on which this water is located is in the custody of the court which appointed Mr. Boyd receiver. Under Section 151-133 of the 1929 Code, you are authorized to hold a hearing for the purpose of determining "whether there is unappropriated water available for the benefit of the applicant." It seems to me that you are confronted with the following questions:

1. Is the water under consideration public water of the State of New Mexico, subject to appropriation?
2. If so, how much of such water is unappropriated and available for the benefit of the applicant?

If the water is "public water of the State of New Mexico" and unappropriated, I cannot see how it can be in the lawful possession of the receiver or in the lawful custody of the court. It would, therefore, seem to me that the grounds mentioned by the protestant are not reasons for not holding a hearing, but, on the other hand, are the very questions to be determined upon a hearing.

I think there is some question as to whether or not the water under consideration is subject to appropriation, but I do not think this fact can be determined from the application alone, and I am of the opinion that you should proceed with a hearing and, from all the facts which you may be able to ascertain, determine whether or not a permit should be issued.

Asst. Attorney General