

## Opinion No. 36-1408

July 16, 1936

**BY:** FRANK H. PATTON, Attorney General

**TO:** Hon. Thomas M. McClure, State Engineer, Santa Fe, New Mexico.

{\*131} Your letter dated July 13th, 1936, requesting our opinion upon the following questions, is hereby acknowledged.

"How near to a stream bed can a person dig or drill a well and use water from said well without being subjected to the procedure of acquiring a permit to appropriate water from the stream?"

Relative to your first question, we will only endeavor to give you a general opinion and if an actual case exists, before rendering a specific opinion relative thereto, we desire a complete statement of facts.

If the power to require a permit to appropriate water from the stream is to be brought within Chapter 131, Laws of 1931, it would be necessary to ascertain if the appropriation is to be for irrigation or industrial uses. Further, Chapter 131, Laws of 1931, only applies to water lying within **reasonably ascertainable** boundaries. If the well in question does not fall within the category of the above, but is as any other private well, then, in our opinion, it would make no difference how near it is drilled to the stream unless, in fact, said well reduces the stream flow or takes or draws water from such stream.

You next ask:

"What is the status of water emerging from an old mine tunnel and flowing into a stream? Is this water subject to appropriation farther down the stream or is it the property of the owner of the mine or tunnel from which it flows? Would the abandonment of the mine have any effect on the status of this water?"

In our opinion, your second question has been answered by the case of Hagerman Irrig. Co. v. East Grand Plains Irrig. District, 25 N.M. 649, 187 P. 555. The Supreme Court of New Mexico said:

"The creator of an artificial flow of water is the owner of the water so long as it is confined to his property, but when such artificial waters are deposited into a natural stream, and the creator of the flow has lost his dominion over the same, such waters become a part of the waters of the stream, and are subject to appropriation and use; but it is only after such waters reach the stream that they are subject to appropriation and use, and the appropriator or user of such waters can acquire no right, as against the creator of the flow, to require him to continue supplying such waters to the stream."

Trusting the foregoing answers your questions, we are,

By EDW. P. CHASE,

Asst. Atty. General