

Opinion No. 39-3285

September 22, 1939

BY: FILO M. SEDILLO, Attorney General

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

{*107} I have examined decree in cause No. 4482 Farmer's Development Company vs. The Rayado Land and Irrigation Company from Colfax County, and your letter inquiring:

"First: Has the Court of jurisdiction in this action retained jurisdiction?

Second: What maximum quantity in cubic feet per second are the various ditches along this stream allowed to divert?"

The water adjudication statutes do not make provision for the reservation or continuing exercise of jurisdiction after decree adjudicating waters has been entered. The decree reserves jurisdiction with respect to certain inchoate water rights, but as to everything else it specifically states in subparagraph (d) of paragraph 9 of the general findings that the decree is final as to all matters therein adjudicated.

In my opinion, therefore, the court has lost jurisdiction in the case; but I am sure that such a controversy as that mentioned in your letter could be determined by another suit between the parties interested which would have the effect of interpreting the terms of this final decree.

The court determined the capacity of the intake as to each ditch. It then provided that water under the decree "shall not be in excess of the rate of one cubic foot of water per second of time for each seventy acres or the equivalent thereof delivered on the land," and in the same paragraph it further provided that "there shall be no right to divert a greater quantity of water than the capacity of the intake thereof as shown by the findings of this court herein."

These limitations are found in paragraph 4 of the main findings to the decree, and it is clear from this paragraph that there shall be no right to divert a greater quantity of water than the capacity of the intake, and in no event to exceed one cubic foot per second of time for each seventy acres. In other words, if the intake is so large that more than one cubic foot per second of water for each seventy acres can be diverted, the limit is one foot per second {*108} for each seventy acres; but if the intake as found by the court was so small that one cubic foot of water per second for each seventy acres could not be diverted, then the capacity of the intake as found by the court in the decree is the limit which can be diverted through the particular ditch, and the intake cannot be enlarged to accommodate more.

I notice a very general and vague statement in the last clause of paragraph 6 of the decree with respect to diversion of water for storage. For this reason I have suggested that an action may be necessary to determine their rights under the decree in case of dispute.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.