

Opinion No. 49-5185

January 8, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: John H. Bliss State Engineer Office of the State Engineer Santa Fe, New Mexico

{*4} We have your letter of December 29, 1948, requesting the opinion of this office upon the question of whether or not the State Engineer has the power under the underground water law to declare such basins and assume administrative jurisdiction over them.

Section 77-201, N.M.S.A., 1941 Compilation, setting forth the duties of the State Engineer, provides in part as follows:

"There shall be a state engineer, who shall be a technically qualified and registered professional engineer under chapter 45, Session Laws 1935 (Secs. 51-2401 -- 51-2425), and who shall be appointed by the governor and such appointment confirmed by the senate. He shall hold office for the term of two (2) years from and after his appointment, or until his successor shall have been appointed, and shall have qualified. He shall be subject to removal only for cause. **He shall have general supervision of the waters of the state and of the measurement, appropriation, distribution thereof, and such other duties as are required by this articles. * * * ***"

By Section 77-1101 of the 1941 Compilation, underground waters were declared to be public. Although Section 77-201, quoted above, might be in itself sufficient to place these waters under the jurisdiction of the State Engineer, the Legislature went further, and by Section 77-1103 provided a method of procedure for application to the State Engineer for permission to use such waters, publication of notice, and hearing of objections. In addition, owners of vested rights in such waters, are to file declarations which are to be recorded with the State Engineer (Sec. 77-1105). Further, the locations of wells may be changed only with permission of the State Engineer (Section 77-1107). To effectively carry out the provisions of the above, Section 77-1111 provided:

"The state engineer is hereby given the power and it is made his duty to formulate rules and regulations for the purpose of carrying out the provisions of act, which rules and regulations shall be printed and made available for distribution to all applicants."

A study of the Underground Water Act as a whole indicates that the entire jurisdiction over the waters defined in Section 77-1101 is vested in the State Engineer.

It is noticed, however, that there is no specific power in the State Engineer to declare underground streams, channels, artesian basins, reservoirs, or lakes as such. On the other hand only such waters as have reasonably ascertainable boundaries are public waters and subject to appropriation under the act. Until such time as there is a

determination by the State Engineer of the boundaries of a certain basin, those wishing to appropriate the waters therefrom would have no way of knowing whether the particular water was subject to the provisions of the act.

It is, therefore, the opinion of this office that after the State Engineer has determined that any waters mentioned in Section 77-1101 of the 1941 Compilation have reasonably ascertainable boundaries, he may, under the rule and regulation making power conferred upon him by Section 77-1111 declare the same to be public waters and assume administrative {*5} jurisdiction over the waters within the boundaries so declared.