

## **Opinion No. 58-192**

September 17, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,  
Assistant Attorney General

**TO:** Mr. Dan Sosa, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

### **QUESTION**

#### QUESTIONS

1. Whose responsibility is it to properly maintain the irrigation and drainage system of the Elephant Butte Irrigation District, in the interest of public health and safety?
2. What is the proper legal procedure necessary to force the abatement of the nuisance?

#### CONCLUSIONS

1. The Elephant Butte Irrigation District.
2. Mandamus.

### **OPINION**

#### ANALYSIS

The above questions arise by virtue of a special meeting held by the Board of County Commissioners of the County of Dona Ana, State of New Mexico, on the 7th day of September, 1958. At the said meeting, a resolution was passed stating as follows:

"WHEREAS, The Board of County Commissioners in the interest of public health and safety do feel that the recent heavy infestation of mosquitos and the presence of encephalitis necessitates that we as a Board of County Commissioners must recognize that we have a responsibility to the general public in this present crisis.

WHEREAS, the concensus of opinion is that the present condition of irrigation and drainage ditches is the largest contributing factor to our present crisis.

WHEREAS, There is known to exist a disagreement as to whose responsibility, is the proper maintenance of the irrigation and drainage ditches.

THEREFORE, BE IT RESOLVED, that in the interest of public health and safety, we feel that the responsibility should be definitely fixed and a feasible program of adequate maintenance must be developed to prevent a recurrence of our present crisis.

BE IT FURTHER RESOLVED, that the Board of County Commissioners do this day request that the District Attorney of Dona Ana County immediately request an Attorney General's opinion as to whose responsibility it is to properly maintain the irrigation and drainage system in the interest of public health and safety."

In view of the foregoing, as a practical matter, we are asked whether the Elephant Butte Irrigation District, by legal process, may be compelled to render certain improvements to their canals and ditches.

At the outset for the purpose of this opinion, it is assumed that the present conditions of the Elephant Butte Irrigation District irrigation ditches and drainage canals largely contribute to the crisis present in Dona Ana County as stated by the said County Commissioners in their resolution above. Although such proof would necessarily have to be legally established, and assuming such proof could be presented in a court of law, we are of the opinion that the said district must take the necessary steps to abate the conditions which give rise to the health hazard undeniably now present in Dona Ana County.

The question as to whether an irrigation district must abate a nuisance existing by virtue of its physical facilities has never been raised in our Supreme Court. The problem is, however, not novel in neighboring states. In *People v. Glen-Colusa Irrigation District*, (Cal. 1932), 15 P. 2d 549, it was held that an injunction against an irrigation district's diversion of water from a river until it constructed a fish screen was proper to prevent the destruction of fish in consequence of such diversion. The fact that the irrigation district was formed under state laws and was by state and federal laws granted the right to divert waters of the river for irrigation purposes was held not to excuse its failure to maintain the fish screen. The California Court further held that the injunctive action against the irrigation district's diversion of water from the river until it constructed the fish screen was maintainable by the people of California without proof that the district possessed financial ability to install the said screen. The case, in brief, concluded that the facts disclosed that the irrigation district's diversion of water without the maintenance of a fish screen resulting in the destruction of fish constituted a nuisance at common law and hence was subject to abatement.

An abatement of a nuisance created by a defective impounding dam and the absence of head gates and control gates at an intake canal of a reservoir was granted against an irrigation company in *Seven Lakes Water Users Association v. Fort Lyon Canal Company*, (Cal. 1931), 4 P. 2d 1112. In this case the unsafe condition of the impounding dam was held to constitute a threat of eminent danger to the public and private interests alike, therefore constituting a nuisance. The court directed the installation of facilities necessary to correct or abate the said nuisance.

In *Salt River Valley Water Users Association v. Arthur, et ux.*, (Ariz. 1937), 74 P. 2d 582, the said association, a public corporation was engaged in the business of operating a canal system in Maricopa County, Arizona. The association allowed a waste ditch running along the plaintiff's property to become clogged so that the water in the ditch backed up at various times and became stagnant. Mosquitoes and other noxious insects bred in the water and an offensive odor arose caused by decaying vegetable and animal matter. An action for damages was allowed for failure on the part of the irrigation district to use reasonable care in the maintenance and operation of its ditches.

In view of the foregoing authorities and based on the dictates of common sense we believe that a court could certainly hold that the Elephant Butte Irrigation District is maintaining a public nuisance of its ditches and canals are breeding mosquitoes which have resulted in the presence of encephalitis. Although New Mexico has no specific statutory laws requiring the abatement of this particular type of nuisance the conditions now existing constitute a nuisance at common law and hence should be abated in the interest of the public health and safety in the opinion of this office.

It is argued however that irrigation and ditch companies possess only such powers as are conferred on them by statute and that the Elephant Butte Irrigation District can expend the district's funds only in line with the purposes of the said district. With this general statement we take no issue. It is the opinion of this office however that the Board of Directors of the said district may expend the district's funds to abate the existence of the present nuisance. Section 75-22-12 N.M.S.A. 1953 Compilation provides for a board of directors of an irrigation district and charges them with the management of the district's affairs and allows the directors to execute all necessary contracts and to employ such employees necessary to carry out the business of the district. Section 75-22-14, N.M.S.A., 1953 Compilation, allows the acquisition of property. The board of the irrigation district under this section is allowed to sue, appear and defend in person by its attorneys in the name of the said irrigation district. Section 75-25-15, N.M.S.A., 1957 Pocket Supplement, grants authority for the issuance of bonds for the purpose of "repairing extending, improving and constructing necessary betterments" to its ditches and works. It is our opinion that the clearing of ditches and canals of trees, weeds and other vegetation, which presumably contributes to the present crisis in Dona Ana County, could be considered as the "improvement or necessary betterment" of the said district's ditches and canals.

Assuming that the Elephant Butte Irrigation District refuses to act to abate the nuisance created by its facilities on the strength of this opinion, it is suggested that a mandamus action be brought against the directors of the said district. The purpose of the action would be to force the board of directors of the district, either by contract or through its employees, to improve or construct necessary betterments to its canals in order to abate the present health hazard now existing. It is suggested that this action be taken at an early date if the Elephant Butte Irrigation District believes they lack the necessary authority to improve its facilities in the interest of the public health.

In any event, this office is of the opinion that mandamus is the proper remedy to force the abatement of the health hazard created.