

Opinion No. 58-95

May 6, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Jr., Assistant Attorney General

TO: Honorable R. C. Morgan, New Mexico State Senator, Portales, New Mexico

QUESTION

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1. Is a permit required of a farmer to have mechanical repairs made on his irrigation well?
2. May a farmer obtain a temporary permit from the State Engineer in the case of an emergency for the change of the location of a well not to exceed one year and certain other provisions without having the delay of advertising for a permit under Section 75-11-7, N.M.S.A., 1953 Comp.?
3. Is a farmer who applies for a permit to permanently change location of a well required to have the land that is irrigated surveyed?

CONCLUSIONS

1. Yes.
2. See Opinion.
3. No.

OPINION

ANALYSIS

Your first question does not distinguish between shallow wells and artesian wells and, therefore, we have assumed that you are referring to shallow wells, since Section 75-12-4, N.M.S.A., 1953 Comp., makes it clear that a permit would be required to have mechanical repairs made on an artesian well. The relevant language in the above cited statute reads as follows:

"The owner of the lands upon which any artesian well is situated or is to be drilled or his or its agent or attorney **shall make application to the state engineer for permit to drill, repair, plug or abandon** an artesian well, setting forth the plan of operations to be performed, which shall conform with the provisions of this act and the rules and

regulations promulgated pursuant thereto, and said application shall be approved by the state engineer before work thereon can proceed." (Emphasis ours)

Although there exists no similar provision in the underground water law of this state in regard to repairs of shallow wells, the State Engineer pursuant to his rule-making power conferred by Sec. 75-11-11, N.M.S.A., 1953 Comp., has promulgated Rule V (D) in regard thereto which may be found in the Manual of Rules and Regulations Governing Underground Waters issued by the office of the State Engineer. This rule provides in part as follows:

"Application to repair any well, shallow or artesian, shall describe adequately the repairs proposed by the applicant and shall be accompanied by the proper filing fee. If the application is in good order and the State Engineer finds that the well may be adequately repaired by the procedure proposed, he shall approve the application and set a time within which the work shall be completed."

In our opinion, the language quoted above would require that application be made to the State Engineer for a permit to make any repair whatsoever on a shallow well. This should not be taken to mean, however, that a permit would be required for the repair of an irrigation pump situated on a shallow well.

Although there exists no specific statutory authority which would require that a permit be obtained from the State Engineer before commencing repairs on a shallow well, it is our opinion that the State Engineer was acting within the scope of power conferred upon him by Sec. 75-11-11, supra, in promulgating the above quoted rule inasmuch as it is possible that faulty repairs to a well might result in damage to the underground reservoir or impair vested rights of others.

Turning to your second question, Sec. 75-11-7 becomes material and provides as follows:

"The owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer and upon showing that such change or changes will not impair existing rights and to be granted only after such advertisement and hearing as are prescribed in the case of original applications.

When the owner of a water right makes application or applications for a temporary change of not to exceed one (1) year for not more than three (3) acre-feet of water to a different location, or to a different use, or both, the state engineer shall make an investigation, and, if such change does not permanently impair any vested rights of others, he shall make an order authorizing the change. If he shall find that the change sought might impair such rights, he shall order advertisement and hearing as in other cases."

The second paragraph in the above quoted section gives the State Engineer the power to grant temporary permits not to exceed one year for change of well locations in cases

of emergency without advertising if in his opinion such change will not permanently impair any vested rights of others. However, it should be noted that the temporary permit to change the location of a well is limited to the use of three acre-feet of water. The usual duty of water is three acre-feet of water per acre per annum and thus it is obvious that this section would be of little benefit, if any, to farmers who have a breakdown or cave-in during the growing season.

We are informed that the State Engineer has in the past granted emergency authorization for the drilling of a well to prevent the loss of a crop during the growing season on the theory that it was the legislative intent in enacting the Underground Water Act to delegate sufficient authority to the State Engineer to issue emergency authorizations. However, this assumed power by the State Engineer was attacked in the case of **In The Matter of the Application of M. T. Brown and C. V. Hoke, Protested by Chester E. Barnett**, Roosevelt County, Cause No. 6379, in which the Hon. E. T. Hensley, Jr., District Judge, held as a matter of law that it was unlawful to change the location of a well except as provided in Sec. 75-11-7, supra. This decision has been appealed by the State Engineer of New Mexico and by the applicants in that case. This office as legal counsel for the State Engineer will maintain the State Engineer's position in this matter before the Supreme Court. In the event the Supreme Court sustains the position of the State Engineer in this matter, then the procedure of granting emergency authorization will afford a farmer the relief contemplated in your inquiry. But should the State Engineer receive an unfavorable opinion from the Supreme Court on this question, then it is our opinion that legislation will be required to provide a speedy relief for farmers who suffer a breakdown or cave-in during the growing season and need a new well immediately in order to prevent loss of a crop.

In answer to your final question, Sec. 75-11-3, N.M.S.A., 1953 Comp., sets out the procedure to be followed in applying for the use of underground water and provides in part as follows:

"Any person, firm or corporation desiring to appropriate for irrigation or industrial uses any of the waters described in this act (75-11-1 to 75-11-10) shall make application to the state engineer in a form to be prescribed by him in which said applicant shall designate the particular underground stream, channel, artesian basin, reservoir or lake from which water is proposed to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the amount of water applied for, the use for which it is desired **and if the proposed use is irrigation, the description of the land to be irrigated** and the name of the owner thereof." (Emphasis ours).

It has always been assumed by the State Engineer and is the opinion of this office that the description of land contemplated by the above quoted section is a legal description and thus a survey would be necessary

However, we assume from your question that you are merely referring to a change of location of a well and not referring to a change of location of a well and place of use of

water. In the former case, where the well location is merely changed and there is no change in the irrigated land, no survey or proof of application to beneficial use is required. (See Rule IV (D) **Manual of Rules and Regulations Governing Underground Waters**).