

Opinion No. 64-127

September 29, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. John Humphrey, Jr., Assistant District Attorney, Tenth Judicial District, Fort Sumner, New Mexico

QUESTION

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Can an Assistant District Attorney, as a part of his private law practice, represent an applicant for a permit to drill an irrigation well, at a hearing on the application before the State Engineer when the well is to be drilled within the district for which he was appointed?

CONCLUSION

No.

OPINION

ANALYSIS

Section 75-2-10, N.M.S.A., 1953 Compilation provides:

"The attorney general and the district attorney of the county in which legal questions arise, shall be the legal advisers of the state engineer, and shall perform any and all legal duties necessary in connection with the work, without other compensation than their salaries as fixed by law, except when otherwise provided."

The provisions of this section are automatically invoked when a legal question arises in a particular county. Obviously this would mean legal questions involving water and water rights. Because all public water of the state is subject to appropriation and because the rights acquired for the use of public water are property rights, any time a water right matter is brought before the State Engineer legal questions are involved.

The provisions of Section 75-2-10, N.M.S.A., 1953 Compilation make the District Attorney more than a mere adviser since it requires him to "perform any and all legal duties necessary in connection with his work." The District Attorney, under this language is subject to being called upon to represent the State Engineer both in administrative hearings and in the District Court. It therefore follows that the District Attorney of a particular county would be precluded from representing an applicant to drill an irrigation

well at a hearing before the State Engineer because he may also be called upon for legal assistance by the State Engineer.

In addition to Section 75-2-10, Section 17-1-11 makes it a duty of the District Attorney to;

". . . prosecute and defend for the state in all courts of record of the counties of his district, all cases, criminal and civil, in which the state or any county in his district may be a party, or may be interested or concerned."

Certainly in matters involving the public water of New Mexico the State has an interest. Such being the case, the District Attorney of a particular district may not prosecute the claim of an applicant in a hearing before the State Engineer and then represent the State Engineer if the matter moves into District Court.

The two sections discussed above make it clear that the answer to your question is that a District Attorney may not represent an applicant before the State Engineer on water and water right matters that arise in any of the counties within the jurisdiction of the District Attorney. By virtue of Section 17-1-2, N.M.S.A., 1953 Compilation, Assistant District Attorneys are charged with the same duties and obligations as is the District Attorney. It is therefore clear that the restraint upon practice before the State Engineer also extends to Assistant District Attorneys.