

Opinion No. 14-1198

April 21, 1914

BY: IRA L. GRIMSHAW, Assistant Attorney General

TO: Mr. James A. French, State Engineer, Santa Fe, New Mexico.

WATER.

Duties of State Engineer in regard to applications for waters for beneficial use.

OPINION

{*56} We have your letter of the 18th instant, together with letter of Mr. James W. Norment, asking our opinion on the matters of law submitted to you by Mr. Norment. We will take them up in the order in which they appear in the letter of Mr. Norment.

(1) What right exists under original approved application for water in a case wherein no construction work has commenced, within the time specified in the approved application?

The order of the State Engineer that the work shall commence at a certain designated time is made by virtue of the power in him vested to make rules and regulations to carry out the provisions of the law. The rule is flexible, of course, for if the Engineer has the power to make it, he has the power to alter, change, amend or repeal it in his discretion. Until he takes some action in the matter, for instance by way of cancelling the approval of the application to appropriate waters, or until the time designated for the completion of the construction work or application of the water to a beneficial use has expired, the applicant's rights are not different or changed from what they were in the first instance.

(2) Where there has been an attempt at construction but the required one-fifth of said work has not been completed on {*57} or before the time limit fixed in the approval of the application to appropriate, what rights, if any, exist thereunder?

Section 29 of Chapter 49 of the Laws of 1907 requires that the construction of the works shall be diligently prosecuted to completion. The law fixes a maximum period of time in which the construction must be completed, but authorizes the Engineer to extend the time within certain limits. If the Engineer were of the opinion that one-fifth of the construction work has not been completed within one-half of the time allowed, and he was not inclined to grant an extension of time to complete such work, he could, no doubt, cancel the approval of the application to appropriate because of the violation of the requirement that one-fifth of the work be completed at a certain time. However, in the absence of any action on his part, and in the absence of the acceptance and approval by him of an application to appropriate the waters or some of the waters included in the permit issued to the person or concern in default, the rights of the

original applicant would be unchanged. He still has a right in futuro, but to perfect the absolute right good cause for failure to complete one-fifth of the work must be shown and an order of extension of time obtained.

(3) When the whole of the construction work has not been completed within the time specified in the approval of the application to appropriate, what right exists under the approved application?

In the absence of the grant of an extension of time by the State Engineer for the completion of the construction work the applicant would have no existing rights under the approved application. The law requires that the construction work be completed within a specified time. It permits an extension of that time by order of the State Engineer. The right of the applicant to the water does not become matured until he has complied with all the preliminary steps and has constructed the works, received the approval and certificate of the State Engineer thereon and applied the waters to a beneficial use. Until those things are done he has only a right in futuro, the consummation and maturity of which is dependent on those things hereinbefore mentioned. Pending the consummation of the right, the applicant, if he is observing the mandates of the law in all regards, has a superior and prior right to the privileges specified in the application and approval.

However, while the applicant may lose his right to the prior use of the waters by his inaction, still we assume that your policy would be to grant extensions of time for completion of construction work to applicants who have pursued some work of construction in good faith.

(4) What rights exist under approved application to appropriate water when there has been no application of the water to a beneficial use?

This question has been practically answered in the answer to the last question hereinabove set forth. The right to appropriate does not become fully matured until the water is actually applied to a beneficial use. The application to a beneficial use has the effect of ripening the inchoate right -- the right in futuro -- into an absolute right in present. The application of the water to a beneficial use is ^{*58} the very basis and foundation of the right to appropriate the water.

(5) When there has been no construction or work of value showing good faith, what period in your requirement does applicant lose his right under an approved application?

The approval of the application has only the effect of permitting the applicant to become vested with a priority of right to apply the waters to a beneficial use after he has complied with the requirements of the statute and the rules and regulations of the State Engineer. There is no definite time in which an applicant loses his right under an approved application because of lack of good faith in his construction work or work of value, with one possible exception, and that is, he loses his right when his construction work has not been completed within the specified time, in the absence of a grant of an

extension of time. Lack of good faith would have to be shown extraneously, if it occurred prior to the time in which the construction work must have been completed, and when the State Engineer made an adjudication that there was a lack of good faith and cancelled the approval of the application, the applicant's right would expire and become ineffective. Until that time, in the absence of the exception hereinabove made, the applicant is the possessor of an inchoate right which may be subject to enlargement by his future action.

In answer to the question contained in your letter as to whether or not an applicant, who has been granted a permit to appropriate water and whose application is still in force, is justified in stopping construction work pending the making of a hydrographic survey and the determination of the amount of unappropriated water in the stream, and as to whether or not your office would be sustained in granting an extension of time under those circumstances, in accordance with Sec. 29 of Chap. 49 of the Laws of 1907. We desire to say that the law requires that the construction work be diligently prosecuted to completion. The question as to diligence is one for your judgment and discretion. The statement of facts is so indefinite that we are not in a position to advise you as to whether or not your office would be sustained in the granting of an extension of time, or whether or not the applicant is justified in stopping the construction work pending the making of a hydrographic survey. A determination of this question depends entirely upon the facts of each individual case. In one case the applicant would be justified in stopping work and your office would be justified in granting an extension, whereas in a case of almost similar facts the applicant would not be so justified and your office would not be sustained in granting the extension. The test is whether or not the act which constitutes the reason for the inactivity of the applicant is beyond the power of the applicant to control, and that question is determined entirely under a certain state of facts. You are required only to exercise a sound discretion, and your judgment would not be disturbed by the courts if the exercise of that discretion was clearly not abused.