

[N.M. Stat. Ann. § 73-2-5](#)

Current with legislation through all 2021 regular and special sessions.

Michie's™ Annotated Statutes of New Mexico > Chapter 73 Special Districts (Arts. 1 — 27) > Article 2 Ditches or Acequias (§§ 73-2-1 — 73-2-68)

73-2-5. Ditch over land of another; easement; right of servient owner; penalty.

A. Hereafter in all cases where there has been a continuous use of a ditch for the purposes of irrigation for five years, it shall be conclusively presumed as between the parties that a grant has been made by the owners of the land, upon which such ditch is located, for the use of the same and it is unlawful to interfere with that easement or prevent access to the ditch by the owner of the dominant estate as provided by law; provided that nothing herein contained shall be construed to prevent the owner of a servient estate from making any alterations or changes in the location of any ditch upon his land, so long as such alteration or change of location shall not interfere with the use of or access to such ditch by the owner of the dominant estate. For the purposes of this section, the easement created pursuant to this section shall be adequate to allow for reasonable maintenance, use and improvements to the ditch.

B. In the case of a community ditch or acequia, a criminal complaint for a violation of the provisions of Subsection A of this section may be made by the district attorney or the mayordomo or commission of the ditch or acequia to the magistrate court in the county where the violation occurred. A person convicted of violating the provisions of Subsection A of this section is guilty of a misdemeanor and on conviction, the defendant shall be fined not less than three hundred dollars (\$300) nor more than one thousand dollars (\$1,000) or sentenced up to ninety days imprisonment in the county jail, or both.

C. In the case of a community ditch or acequia, in addition to criminal prosecution, the district attorney or the mayordomo or commission of the ditch or acequia may file a civil complaint seeking a civil penalty not to exceed five thousand dollars (\$5,000) for knowingly, intentionally or willfully violating the provisions of Subsection A of this section.

D. The remedies provided for in this section shall not be construed as limiting the right of the party bringing the civil or criminal complaint from seeking damages. In addition to the remedies provided in this section, the district attorney, mayordomo or commission of the ditch or acequia or owner of the dominant estate may apply to the district court of the county where the violation occurred for an injunction restraining any person from violating or continuing to violate the provisions of Subsection A of this section.

History

Laws 1933, ch. 65, § 1; 1941, ch. 155, § 1; 1941 Comp., § 77-1405; 1953 Comp., § 75-14-5; [Laws 2005, ch. 186, § 1](#).

Annotations

Notes

Amendment Notes

The **2005 amendment**, effective June 17, 2005, added “penalty” to section heading; added Subsection A designation to existing provisions, and therein added “and it is unlawful to interfere with that easement or prevent access to the ditch by the owner of the dominant estate as provided by law” in the first sentence, and added the last sentence; and added Subsections B through D.

Notes to Decisions

Generally.

Applicability.

Dominant estate.

Easement.

Included expenses.

Purpose.

Servient estate.

Generally.

Under [73-2-5 NMSA 1978](#), where there has been a continuous use of a ditch for the purposes of irrigation, for five years, it is conclusively presumed as between neighbors that a grant has been made by the owners of the land, upon which such ditch is located, for the use of the same. [Deaf Smith County Grain Processors v. Dixon, 1993-NMCA-130, 116 N.M. 523, 864 P.2d 812, 1993 N.M. App. LEXIS 122 \(N.M. Ct. App. 1993\)](#).

Applicability.

[Section 73-2-5 NMSA 1978](#) applied to a ditch which was created in 1933, but for which additional interests were not created until 1964. [Cox v. Hanlen, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294, 1997 N.M. App. LEXIS 131 \(N.M. Ct. App. 1997\)](#), cert. denied, 124 N.M. 418, 952 P.2d 19, 1998 N.M. LEXIS 34 (N.M. 1998).

Dominant estate.

Owner of the dominant estate created by express provision has the right to reasonably enter the servient estate to repair and maintain the right of way and remove natural obstructions interfering with its use. [Cox v. Hanlen, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294, 1997 N.M. App. LEXIS 131 \(N.M. Ct. App. 1997\)](#), cert. denied, 124 N.M. 418, 952 P.2d 19, 1998 N.M. LEXIS 34 (N.M. 1998).

Easement.

Ditch easement included reasonable maintenance, such as using a tractor to clean and shape the ditch. [Cox v. Hanlen, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294, 1997 N.M. App. LEXIS 131 \(N.M. Ct. App. 1997\)](#), cert. denied, 124 N.M. 418, 952 P.2d 19, 1998 N.M. LEXIS 34 (N.M. 1998).

[Section 73-2-5 NMSA 1978](#) applied in plaintiff’s action alleging that defendant interfered with plaintiff’s water rights to a ditch because there had been continuous use of the ditch for irrigation purposes, as defendant did not

challenge the sufficiency of the evidence concerning that determination. [Deaf Smith County Grain Processors v. Dixon, 1993-NMCA-130, 116 N.M. 523, 864 P.2d 812, 1993 N.M. App. LEXIS 122 \(N.M. Ct. App. 1993\)](#).

In a trespass action by landowners against adjoining landowners alleging that the water from the adjoining landowners' drainpipe spilled onto their land destroying their crops and turning the land into a swamp, issuance of an injunction and an award of costs to landowners for damage caused by the drainpipe overflow was approved, as there was no evidence that the adjoining landowners had a statutory prescriptive easement pursuant to [73-2-5 NMSA 1978](#). [Archuleta v. Jacquez, 1985-NMCA-077, 103 N.M. 254, 704 P.2d 1130, 1985 N.M. App. LEXIS 581 \(N.M. Ct. App. 1985\)](#).

Defendants' contention that their neighbors had not acquired a right of way over defendants' land by prescription was rejected on appeal under former 75-14-5, 1953 Comp. (now [73-2-5 NMSA 1978](#)), because the neighbors' use of a ditch was open, notorious, adverse, under claim of right, and was not permissive. [Baker v. Hansen, 1968-NMSC-084, 79 N.M. 157, 441 P.2d 55, 1968 N.M. LEXIS 1939 \(N.M. 1968\)](#).

Included expenses.

Users of a community ditch who refused to pay an assessment of their proportionate share of the costs, attorney's fees, and expenses of a mandamus action between members of the ditch commission were properly refused water to irrigate their lands, because the words "other legitimate expenses incident to the proper conduct and maintenance of the acequias under their control" used in former 1915 Code, § 5754 permitted the assessment. [State ex rel. Sanchez v. Casados, 1921-NMSC-101, 27 N.M. 555, 202 P. 987, 1921 N.M. LEXIS 110 \(N.M. 1921\)](#).

Purpose.

The purpose of [73-2-5 NMSA 1978](#) is to reduce the natural tension that exists concerning the degree to which the dominant owner may utilize the servient estate. [Cox v. Hanlen, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294, 1997 N.M. App. LEXIS 131 \(N.M. Ct. App. 1997\)](#), cert. denied, 124 N.M. 418, 952 P.2d 19, 1998 N.M. LEXIS 34 (N.M. 1998).

Servient estate.

[Section 73-2-5 NMSA 1978](#) does not bar the servient estate owner from constructing culverts and water gates in the ditch which do not unreasonably interfere with the use of the dominant estate. [Cox v. Hanlen, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294, 1997 N.M. App. LEXIS 131 \(N.M. Ct. App. 1997\)](#), cert. denied, 124 N.M. 418, 952 P.2d 19, 1998 N.M. LEXIS 34 (N.M. 1998).

Michie's TM Annotated Statutes of New Mexico
Copyright © 2021 Matthew Bender & Company, Inc., a member of the LexisNexis Group.

All rights reserved.

End of Document