

Opinion No. 63-112

August 28, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Honorable Jack M. Campbell Governor of New Mexico Honorable Thomas G. Morris Member of Congress House Office Building Washington, D.C.

QUESTION

FACTS

A question has been raised by the Federal Housing and Home Finance Agency as to whether community ditches (acequias) are political subdivisions, thus entitling them to assistance under Public Law 87-27, Public Law 87-658, and perhaps under others.

QUESTION

Are community ditches (acequias) political subdivisions?

CONCLUSION

Most certainly.

OPINION

{*247} ANALYSIS

I.

HISTORICAL BACKGROUND

Community ditch (acequia) organizations have been in existence in New Mexico for hundreds of years and have played, and continue to play an important {*248} part in our economic and governmental structure. At least as early as 1788 special instructions were sent to corregidores (political and economic magistrates) and superior alcaldes relative to the establishment of community acequias. Hall, **Mexican Law**, § 1042.

As is pointed out in Long, **Law of Irrigation**, § 123 (1900) "In Arizona and New Mexico, a system of public control has been adopted which differs considerably from that obtaining elsewhere in the arid region. The system is borrowed from the Mexican Law. The statutes provide for the construction and control of public acequias, or irrigating canals, owned by a number of persons taking water therefrom. These acequias are constructed and kept in repair by public labor, and are controlled by officers elected by the people interested."

In the case of **Snow v. Abalos**, 18 N.M. 681, 140 Pac. 1044 (1914) our Supreme Court considered the history, nature and character of community ditches, stating:

"The community irrigating ditch or acequia is an institution peculiar to the native people living in that portion of the Southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation. After the Territory of New Mexico was organized, the legislature, by the act of January 7, 1852 (Laws 1851-51 p. 276), provided for the government of community acequias, and doubtless incorporated into the written law of the Territory the customs theretofore governing such communities. Under the act in question, elections were to be called and held by justices of the peace of the various precincts of the Territory, at which all the owners or tenants of lands to be irrigated therefrom were permitted to vote for overseers of such ditches. It was made the duty of such overseers to superintend the repairs and excavation on such ditches, to apportion the persons or numbers of laborers to be furnished by the proprietors, to regulate them according to the quantity of land to be irrigated by each one from said ditch, to distribute and apportion the water in the proportion to which each was entitled, taking into consideration the nature of the seed, crops, and plants cultivated, and to conduct and carry on said distribution with justice and impartiality. Further provision was made as to the repair of ditches, the calling out of laborers, the punishment of overseers for neglect of duty and of all persons obstructing or interfering with the flow of water in a community acequia. Thereafter, at almost every session of the legislature, laws, either general or special, were enacted relative to such acequias, but no important change was made until 1895, when, by section 1, Chapt. 1, S L 1895, the legislature provided that 'all community ditches or acequias, now constructed or hereafter to be constructed in this Territory, shall for the purposes of this act be considered as corporations or bodies corporate, with power to sue or to be sued as such.' The act in question was purely administrative."

Continuing with its historical background treatment the Court said:

{*249} "New Mexico being in the arid region, the early settlements were established along the banks of perennial rivers, or in the mountain valleys where water from springs and creeks was reasonably certain to be available for irrigation at the needed times. As a protection against Indians, settlements were made in communities, and the people built their houses and established their towns and plazas close together, and cultivated the lands in small tracts adjacent to the settlement. When a settlement was established, the people by their joint effort would construct an irrigation ditch sufficiently large to convey water to their lands for the irrigation of crops. Each individual owned and cultivated a specific tract of land, sufficient to provide food for the needs of his family, and from the main ditch laterals were run to the various tracts of land to be watered. The distribution of the water and the repair of the ditch was in charge of a mayordomo, or officer elected by the water users under the ditch. This official would require the water users to contribute labor toward the repair of the ditch and its maintenance, and also distributed the water to the various irrigators equitably, in proportion to the land to be irrigated, as his necessities required."

It is no exaggeration to state that community acequias have been serving as "political subdivisions" in the area that now comprises the State of New Mexico since **at least 1851**. Statutes enacted by the New Mexico territorial legislature, and subsequently the State legislature, have merely confirmed this status.

II.

LEGAL PRECEDENT

(a) Attorney General Opinions.

On February 21, 1940, the then Attorney General of New Mexico advised Congressman John J. Dempsey in Opinion No. 3432 that community ditches (acequias) are political subdivisions. A portion of the opinion reads as follows:

"It is therefore my opinion that community ditches as defined in Chapter 151, Section 426 of the 1929 Code, being Section 8, Chapter 1 of the Session Laws of 1895, **are political subdivisions in New Mexico the same as are counties, townships, and school districts**. To be eligible to hold the position of sheriff in a county one must be a property owner. A person to be eligible to vote in a school bond election must be a property owner. In a community ditch election a person to be eligible to vote must own water rights. (Emphasis added)

"The legislature fixes the date of the election and any officer elected is required to give bond to the State of New Mexico. Thus the community ditch corporation exists for administrative purposes only and has the power to tax the holders of water rights for services and improvements.

Community ditches in New Mexico have been known for hundreds of years as rural water systems and the benefits which accrue to the farmers are similar to the benefits which accrue to the dwellers in cities for municipal water works, both being of a benefit to the public and a necessity for the maintenance of health and life by the distribution of a publicly owned commodity, to-wit: water."

{*250} No attorney general opinions, court decisions or legislative enactments have been handed down since the date of this opinion which in any way modify, limit or supersede the conclusion of the Attorney General. That the chief legal officer of this State has specifically held that community acequias are political subdivisions should, we think, be conclusive of the matter. Particularly is this true since the legislature is aware of Opinion No. 3432 and has certainly expressed no contrary legislative intent in the intervening 23 years. However, since some Federal agencies seem to entertain reservations on the subject, we have chosen to go into more detail in this opinion.

(b) Constitutional provisions.

The New Mexico Constitution, Article VIII, Section 3, exempts three classes of property from ad valorem taxation, namely, (a) property of governmental units, (b) property used for charitable purposes, and (c) property used for educational purposes. Listed under the exemption for governmental units are "community ditches and all laterals thereof." To us this is tantamount to stating that community ditches are political subdivisions, particularly since our Court has held that all irrigation works other than community ditches are taxable. **State v. San Luis Power and Water Co.**, 51 N.M. 294, 183 P.2d 605. In the case of **Storrie Project Water Users Assn. v. Gonzales**, 53 N.M. 421, 209, P.2d 530, a non-profit corporation organized to operate an irrigation system supplying water for the mutual advantage of its shareholders was held **not** to be a community ditch and thus it was held to be taxable.

Laws governing the operation of community acequias were enacted by the territorial legislature of 1895, and Article 22, Section 4 of the New Mexico Constitution provides that "all laws of the territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this Constitution, shall be and remain in force as the laws of this state."

Section 4, Article 16, New Mexico Constitution, provides that "The legislature is authorized to provide by law for the organization and operation of drainage districts and systems." As our Court said in the case of **In re Dexter-Greenfield Drainage District**, 21 N.M. 286, 154 Pac. 382 (1915);

"The grant to the Legislature under this section would seem to be plenary, and to authorize it to provide for drainage districts, in such form as it in its discretion may adopt."

One form of such districts is the community acequia.

(c) New Mexico Court decisions and statutes.

In the early case of **Candelaria v. Vallejos**, 13 N.M. 146, 81 Pac. 589 (1905) our Supreme Court said that community ditches belong "to the class of corporations known as public involuntary quasi corporations." It then quoted approvingly from an Illinois case setting forth the character of such corporations as follows:

"In regard to public involuntary quasi corporations the rule is otherwise, and there is no such implied liability imposed upon them. These latter -- such as **counties, townships, school districts, and other similar quasi corporations** {**251*} exist under general laws of the state which apportion its territory into local sub-divisions for the purpose of civil and governmental administration and impose on the people residing in said several sub-divisions precise and limited public duties and clothe them with restricted corporate functions, co-extensive with the duties devolved upon them." (Emphasis added).

Our Supreme Court, in effect, recognized the obvious fact that a community ditch has the same status as a political subdivision as do counties, townships, or school districts.

When we examine the numerous statutory provisions governing the make-up of community acequias, their powers, duties, liabilities, etc., it seems clear to us that community acequias were "formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves."

Thus they are political subdivisions. **Gibbany v. Ford**, 29 N.M. 621, 225 Pac. 577 (1924).

Under Section 75-14-1, N.M.S.A., 1953 Compilation, community acequias have the power of eminent domain. **City of Albuquerque v. Garcia**, 17 N.M. 445, 130 Pac. 118 (1913). Section 75-14-9, N.M.S.A., 1953 Compilation, declares that all rivers and streams of water in this state, known prior to January 7, 1852, as public ditches or acequias, are established and declared to be public ditches or acequias. Other sections relate to the election, qualifications and compensation of acequia commissioners and mayordomos and the filling of vacancies of these offices. Sections 75-15-1, 75-14-12, 75-14-13, 75-14-14, 75-14-15, 75-14-16, 75-14-17, 75-14-18, N.M.S.A., 1953 Compilation.

Still other sections relate to the removal of commissioners and the penalties that can be imposed against them. Sections 75-14-26, 75-15-7, 75-15-8, 75-14-43, 75-14-47, 75-14-61, N.M.S.A., 1953 Compilation. In fact, Sections 75-15-1 and 75-14-12, N.M.S.A., 1953 Compilation, require the mayordomo and the treasurer of the community acequia to execute a bond **to the state**, conditioned on the faithful performance of their duties.

Section 75-15-3, N.M.S.A., 1953 Compilation contains provisions relating to canvassing procedures and election contest procedures in acequia elections and states that the contest procedure is the same "as provided by law in the case of general elections for **county officers**." (Emphasis added).

Section 75-15-4, N.M.S.A., 1953 Compilation, provides, among other things, that the mayordomo shall collect fines, and that all reports of the commissioners and mayordomos are public property and are subject to public inspection.

The Commissioners and mayordomos are expressly authorized to levy assessments. Sections 75-14-21, 75-14-23, 75-14-41, 75-14-50 and 75-15-4, N.M.S.A., 1953 Compilation. In fact, the **1963** session of the New Mexico legislature enacted the following new provision:

"Whenever any person, after due notice, has failed to do his work or has failed to pay any amount assessed against him on any acequia or ditch, in the state, the mayordomo {*252} or superintendent of the acequia or ditch may bring a civil action in the courts of this state for collection of the amount assessed. . ."

(d) Texts and legal principles.

In **McCarthy, The Community Acequia in New Mexico**, p. 11 (1958) (unpublished) the author makes the following statement:

"Community acequias are political sub-divisions in New Mexico, the same as are counties, townships and school districts. As the acequia corporation exists for administrative purposes only, it has the power to tax the holders of water rights for services and improvements." (Emphasis added).

A political subdivision of a state is a subdivision thereof to which has been delegated certain functions of local government. **Standard Oil Co. v. National Surety Co.**, Miss., 107 So. 559; **Commander v. Board of Commissioners of Buras Levee District**, La., 11 So. 2d 605.

As the Federal Court has stated, the term "political subdivision" is comprehensive and denotes any division of a state made by proper authorities thereof, acting within their constitutional powers, for purposes of carrying out a portion of those functions of state which by long usage and inherent necessities of government have always been regarded as public. **Commissioner of Internal Revenue v. Shamburg's Estate**, 144 F.2d 998. Community acequias certainly fall within this definition, particularly since Article XVI, Section 2 of the New Mexico Constitution provides that "The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public. . ." In fact, a municipality has no power of eminent domain over the community acequia since that property is already devoted to a public use. **City of Albuquerque v. Garcia**, 17 N.M. 445, 130 Pac. 118 (1913). As our Court has also noted, community acequias are public acequias. **State ex rel., Black v. Ditch Co.**, 25 N.M. 590, 185 Pac. 549 (1919).

The following have been declared by the courts to be political subdivisions: drainage districts, irrigation districts, navigation districts, levee districts, improvement districts, sanitary districts, road districts, power districts, conservation districts, reclamation districts. **Jones v. Jefferson County Drainage District No. 6**, Tex., 139 S.W. 2d 861; **Commander v. Board of Commissioners of Buras Levee District**, La., 11 So. 2d 605; **State v. Lincoln County Power District No. 1**, Neb., 11 P.2d 528; **State v. Coulon**, La., 3 So. 2d 241; **Hodge v. Lower Colorado River Authority**, Tex., 163 S.W. 2d 855; **Hicks v. Parish of Union**, 6 La. App. 543; **Ashton v. Cameron County Water Improvement District No. 1**, 298 U.S. 513, 56 S. Ct. 892, 80 L. Ed. 1309.

Naturally there is nothing magic in the term district, and simply because the phrase "community acequia" (ditch) may be foreign to those who live in areas other than the southwest, the fact remains that its functions are similar to a number of the districts mentioned above. The fact also remains that community acequias are political subdivisions and under the spirit of **Erie v. Tomkins**, this conclusion should be determinative of the matter.

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