

Opinion No. 63-78

July 8, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. W. A. Williams, Jr. State Soil Conservation Committee Route 4, Box 36 Santa Fe, New Mexico

QUESTION

FACTS

Certain legal entities of the State of New Mexico are desirous of receiving the benefits of Federal programs to protect and develop water resources. The Federal government requires sponsors to some projects and programs to assume certain local responsibilities, hence the following questions.

QUESTIONS

1. Do watershed districts have the authority to levy assessments, borrow money and/or issue bonds, and if so, may such moneys be used to obtain easements and rights-of-way necessary for construction of flood detention dams?
2. May such moneys be used to obtain easements and rights-of-way necessary for the construction of flood detention dams which are also suitable for recreation purposes?
3. May such moneys be used to obtain easements and rights-of-way necessary for the construction of flood detention dams which are also suitable for recreation purposes and which store water for irrigation?
4. May such moneys be used to pay a portion of the costs of such flood detention dams?
5. May such moneys be used to pay a portion of the costs of reorganizing irrigation districts?
6. May such moneys be used to pay a portion of the costs of supplying water for urban consumption?
7. May such moneys be used to pay a portion of the costs of supplying water for industrial use?
8. May such moneys be used for operation and maintenance?

9. May a watershed district assume the local responsibility required to sponsor a tributary unit of the San Juan-Chama Project?

10. May a watershed district assume the local responsibility required to sponsor project measures of the Northern Rio Grande Resource Conservation and Development Project?

11. What powers do counties have in this area of water conservation and development?

12. What powers do cities have in this area of water conservation and development?

13. Are agreements entered into with the Federal government as to what responsibilities the political subdivision will assume binding on successors?

CONCLUSIONS\$

1. Yes.

2. Yes.

3. Yes.

4. Yes.

5. Yes, if such reorganization is directly related to the conservation of water.

6. No.

7. No.

8. Yes, for operation and maintenance of authorized structures.

9. See analysis.

10. See analysis.

11. See analysis.

12. See analysis.

13. Yes, if the agreement itself is proper.

OPINION

{*163} **ANALYSIS**

1. Your first question asks whether watershed districts organized in accordance with Section 45-5-19, et seq., N.M.S.A., 1953 Compilation (P.S.) have the authority to levy assessments, borrow money and/or issue bonds, and if so, whether such moneys can be used to obtain easements and rights-of-way necessary for the construction of flood-detention dams.

Section 45-5-34, N.M.S.A., 1953 Compilation (P.S.) authorizes a watershed district to levy an assessment not exceeding five mills per dollar of the assessed value of all real property within the district.

Section 45-5-31 (d), N.M. S. A., 1953 Compilation (P.S.) authorizes the board of directors of a watershed district, subject to the approval of the board of supervisors, to borrow money for certain enumerated purposes and repay these loans with the assessment above mentioned or by the issuance and sale of bonds as provided in Section 45-5-32, N.M.S.A., 1953 Compilation (P.S.).

Moneys raised by any of these means can be used to obtain easements and rights-of-way necessary for the construction of flood detention dams. Section 45-5-31 (B), N.M.S.A., 1953 Compilation (P.S.) authorizes a watershed district to acquire, by purchase, gift, grant, bequest, devise or through condemnation proceedings, such lands or rights-of-way as are necessary for the exercise of any authorized function of the district. The construction of a flood detention dam is an authorized function of the district since the purpose of watershed districts as set forth in Section 45-5-22, N.M.S.A., 1953 Compilation (P.S.) is the development and execution of plans and programs "relating to any phase of conservation of water, water usage, flood prevention, flood control, erosion prevention and control of erosion, flood water and sediment damages."

2. You next ask about obtaining easements and rights-of-way for the construction of multi-purpose dams built for flood control {^{*164}} purposes but which impound sufficient water for fishing and other recreational purposes.

If the reason for the construction is flood control, then the fact that the impounded water can be utilized for recreational purposes does not negate the district's authority to obtain the easements and rights-of-way. However, the district's fund cannot be expended for the enhancement of recreational purposes. The district's authority is limited to the development and execution of "plans and programs relating to any phase of conservation of water, water usage, flood prevention, flood control, erosion prevention and control of erosion floodwater and sediment damages." Section 45-5-22, N.M.S.A., 1953 Compilation (P.S.).

3. Your third question is the same as number 2 above except that the flood detention dam has a third use, namely, storage of water for irrigation and other purposes. Since this use relates directly to the conservation of water, the answer is the same as that given above.

4. Your fourth question asks whether the district's funds, whether obtained by borrowing, issuing bonds, or the levying of assessments, can be used to pay a portion of the costs of constructing a flood detention dam. The answer is yes.

Section 45-5-31 (C), supra, authorizes the district to "construct, improve, operate, contract and maintain such structures as may be necessary for the performance of any function authorized by the Watershed District Act." And as we pointed out above a flood detention dam is such an authorized structure.

5. You ask whether the district's fund can be used to pay a portion of the cost of reorganizing irrigation systems. This expenditure of funds is permissible only if the purpose of the reorganization is directly related to the conservation of water or one of the other statutory purposes for which watershed districts are established. See Sections 45-5-21 and 45-5-22, N.M.S.A., 1953 Compilation (P.S.).

6,7. Question number six asks whether the district's funds may be used to pay a portion of the costs of supplying water for urban consumption. Question seven is identical except that the water is to be used for industrial purposes. We think both questions must be answered in the negative A watershed district is not a public utility organized for the purpose of supplying water to consumers. The basic purpose of the district is to "preserve and protect New Mexico's Land and Water resources." Section 45-5-21, supra.

8. In question number eight you ask whether the district can expend its funds for operation and maintenance. The answer is that the district can expend its funds for the operation and maintenance of **authorized structures**, for example flood detention dams.

9,10. In questions nine and ten you ask whether watershed districts can assume the local responsibility required to sponsor a tributary unit of the San - Juan Chama Project and sponsor project measures of the Northern Rio Grande Resource Conservation and Development Project. Again, we would simply advise you that the district can perform the functions set forth in Sections 45-5-21 and 45-5-22, supra, and which have been enumerated in this opinion. The district and its functions must stand on their own. The fact {**165*} that the district's project is related to one of the broader projects which you mention neither adds to nor detracts from the district's statutory authority.

11. You ask whether counties can assume any or all of the above - mentioned responsibilities. Rather than approaching the problem from this standpoint, we will advise you as to what powers counties have in this area.

Section 15-50-1, N.M.S.A., 1953 Compilation, provides that:

"There is hereby created in each county, subject to the approval of the board of county commissioners, of the state of New Mexico through which runs any river or stream which is subject to flood conditions destructive to property or dangerous to human life,

the office of county flood commissioner. Such commissioner shall be appointed by the governor, to serve for a term of two years. . . ."

Section 15-50-2, N.M.S.A., 1953 Compilation, provides that "the several boards of county commissioners of the different counties affected by this act may levy an annual tax on all the taxable property located within five miles of both sides of any river or stream herein described."

The amount necessary to meet the requirements of the act is to be certified to the county commissioners by the county flood commissioner. However, the maximum levy that can be imposed is onehalf mill on each dollar of assessed valuation of all property situate within five miles of each side of the river or stream.

The moneys so collected are to be used for the purpose of "creating a fund out of which to construct and maintain dykes, dams, embankments and ditches, or such other structures or excavations as shall be deemed proper to prevent flood waters from damaging property or human life within such counties."

Section 15-50-5, N.M.S.A., 1953 Compilation, grants to the county flood commissioner "the power to condemn property for the purpose of carrying this act into effect, upon petition to the district courts, and in the manner provided by law for the condemnation of property by railroad corporations."

Section 15-50-6, N.M.S.A., 1953 Compilation (P.S.) provides that "no expense or indebtedness shall be incurred by any county flood commissioner in excess of the amount of any annual levy, excepting where there may be remaining on hand funds arising from previous similar levies."

Section 15-50-8, N.M.S.A., 1953 Compilation, provides that "the county flood commissioners are hereby authorized and empowered to jointly expend money with the county flood commissioners of adjoining counties, or to locate dykes, dams, embankments, ditches, and other structures and excavations without their counties when such location is deemed necessary for the purpose of protecting property and lives in their counties."

The counties' authority in connection with the acquisition of a county water supply system is found in Section 75-4-1.1 through 75-4-1.11, N.M.S.A., 1953 Compilation (P.S.).

Section 75-4-1.1, *supra*, provides as follows:

"Each board of county commissioners {**166*} of any of the several counties of the state in addition to all other powers vested in it, is empowered to acquire, by purchase or exchange upon such terms and conditions and in such manner as a commission may deem proper and to acquire by condemnation in accordance with and subject to the provisions of any and all existing laws applicable to the condemnation of property for

public use any water rights or any portion thereof within its county limits deemed necessary or proper for public use for the development of a county water supply system. Title to property so acquired or condemned shall be taken in the name of the county."

The county water supply system is to be located within the particular county and is to be "for the purpose of supplying water to the inhabitants of **unincorporated** communities of the county for **domestic** and sanitary purposes." Section 75-4-1.2, supra.

The cost of acquiring the property and constructing the water supply system is to be obtained by the issuance of water **revenue** bonds, as distinguished from county general obligation bonds. Section 75-4-1.3, supra. Section 75-4-1.7, supra specifically provides that:

"No county shall have the power to pay out of its general funds or otherwise contribute any part of the costs of acquiring a water supply system. The entire cost of acquiring any system must be paid out of the proceeds from the sale of water revenue bonds issued under the authority of this 1959 act."

12. Turning to cities, about which you next inquire, the relevant provisions dealing with flood control are Sections 14-31-1 through 14-31-8, N.M.S.A., 1953 Compilation. Section 14-31-1, supra, provides as follows:

"There is hereby conferred upon incorporated cities, towns and villages in this state power and authority to protect the property of the inhabitants of such municipalities from damage by flood waters, and for such purpose they may cause to be constructed and maintained within or without the limits of such municipalities, dykes, dams, embankments and ditches, or such other structures or excavations as shall be deemed proper to prevent such flood waters from damaging property or threatening human lives in such municipalities, and they may also cause the natural channel of any stream or streams either within or without the limits of such municipalities to be changed, extended, widened, deepened or raised, and may cause to be removed either within or without the limits of such municipality any obstruction in any such stream or streams for the purpose of opening such channel and diversion of such flood waters."

Municipalities are empowered to levy a maximum tax of five mills on every dollar of assessed property valuations (Section 14-31-3, supra), and they are given the power of eminent domain to "acquire lands, easements, and rights-of-way within or without the limits of such municipality, for the construction of any work necessary for such purpose. . . ." Section 14-31-5, supra.

Section 14-31-8, supra, authorizes such municipalities "to cooperate {*167} with any other municipality, or with any county, or with the State of New Mexico, or any agency of the United States in carrying out the objects and provisions of this act in order to secure protection in such municipality from damages by such flood waters."

Section 14-40-90.1, N.M.S.A., 1953 Compilation (P.S.) provides as follows:

"Cities, towns and villages in the state of New Mexico shall have the power by ordinance to authorize and enter into contracts **extending over a period of years with the United States government or any of its agencies**, with the state of New Mexico or any of its agencies, boards or instrumentalities or with any person, association or corporation for the purpose of obtaining, securing or supplementing their water supply and to provide for the storage, treatment, distribution and transportation of water by pipe lines, conduits, ditches or any other means and to agree to accept any pay for a specified amount of water per annum during the term of the contract and to make and enforce water rates and charges sufficient to meet the payments required by any such contract." (Emphasis added).

13. You inquire whether the governing bodies of watershed districts, counties and cities can contractually bind their successors to an agreement with the Federal government to carry out the local responsibilities of water resource protection and development. As we understand it, the Federal government, as a condition precedent to paying all or a large portion of project construction costs, needs a valid agreement that the local authority will, over the years, provide the maintenance of the project.

It is frequently said, and very often it is true, that in the absence of specific authority a board of public officers cannot, in the exercise of its governmental powers, enter into a contract extending beyond its term of office. **Hargett v. Kentucky State Fair Board**, Ky., 216 S.W. 2d 912. However, like most such all-inclusive rules, there are exceptions to it.

In determining the validity of a contract made by a board or other governmental agency extending beyond the official term of the contracting officials, the test generally applied is whether the contract is an attempt to bind successors in matters incident to such successors' administration and responsibilities, or whether it is reasonably necessary for the protection of public property or interests. If the former is the case, the contract is usually declared invalid. If the latter is the case, the contract is usually declared valid. **Board of County Commissioners v. Simmons**, Kans. 151 P. 2d 960.

It is not to be supposed that simply because the general subject may belong to the field of governmental power, as distinguished from proprietary power, that no detail of administration may be carried out by contract, or that such contract must be completed within the term of office of the contracting parties. It is necessary to ascertain whether the contract itself deprives the successor governing body of a discretion which public policy demands should be left unimpaired. **Plant Food Co. v. City of Charlotte**, N.C., 199 S.E. 712.

As the Court said in the last cited case:

"It is obvious that a too rigid {*168} adherence to the principle would leave the town council nursing a mere theory, in the possession of an important governmental power

without practical means for its exercise, and unable to take any important public work, since no concern would equip itself and undertake the project when the incoming administration, the product perhaps of political accident, might repudiate the contract at will during its performance."

Thus the court noted that a ten year contract to keep a street in repair was valid. In a similar vein the Kansas Court held that an administrative body empowered to manage property can contract concerning such property beyond the term of office of the members. **Fisk v. Board of Managers of Kansas State Soldiers' Home**, Kans., 5 P. 2d 799.

Since the board of directors of a watershed district serve staggered terms (Section 45-5-30, N.M.S.A., 1953 Compilation (P. S.)), there is one further facet of the issue that we will mention. In the case of **Daly v. Stokell**, Fla. 63 So. 2d 644, the court pointed out that since the terms of the city commissioners were staggered, the commission was a continuing body which could contract for any reasonable period of time.

The object of the projects about which you inquire is the protection and development of the State water resources, a great deal of the money for which is to be furnished by the Federal government. In such a situation we do not believe that a relatively long-term agreement by the local governing body to do certain things in connection with the project impinges unduly on the discretion of successor governing bodies.

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