

Opinion No. 64-95

July 24, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Boston E. Witt, First Assistant Attorney General

TO: Mr. S. E. Reynolds, State Engineer, State Capitol Building, Santa Fe, New Mexico

QUESTION

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Can the Interstate Stream Commission make a loan from the Irrigation Works Construction Fund to an acequia for the improvement of a community ditch?

CONCLUSION

Yes.

OPINION

ANALYSIS

Several related problems are comprehended in this question. For purposes of analysis they will be discussed in this order:

- 1) What is the legal nature of an acequia?
- 2) Is the Interstate Stream Commission permitted to lend to an acequia from the Irrigation Works Construction Fund?
- 3) Is the use proposed by the acequia a proper purpose for such a loan?
- 4) Does an acequia have the power to borrow from the Interstate Stream Commission?
- 5) Can an acequia lawfully assess its constituent waterusers for the repayment of such a loan?

1. In Section 75-14-11, N.M.S.A., 1953 Compilation, acequias are described as "corporations or bodies corporate, with power to sue or to be sued as such." Two New Mexico Supreme Court cases have discussed the nature of acequias. The case of **Candelaria v. Vallejos**, 13 N.M. 146, 81 Pac. 589, defines acequias as "involuntary public quasi-corporations" possessing only the powers expressly conferred by statute or necessarily implied from statute. According to **In re Dexter-Greenfield Drainage**

District, 21 N.M. 286, 154 Pac. 382, community ditches or acequias are as much domestic corporations as are drainage districts.

The Attorney General has stated his opinion that community ditches "are political subdivisions in New Mexico the same as are counties, townships and school districts . . ." The community ditch corporation exists for administrative purposes only and **has the power to tax the holders of water rights for its services and improvements.**" (Attorney General's opinion 1939-40, p. 138). The same Attorney General's opinion goes on to compare the operation and function of community ditches in rural areas to municipal water-works in cities. The subject of Attorney General's Opinion was re-examined and confirmed in Attorney General's Opinion No. 63-112, dated August 28, 1963.

It appears to be settled law that an acequia is a form of public corporation and qualifies as a political subdivision of the state. It follows from this that like all other political subdivisions, an acequia is competent to exercise whatever powers the legislature has delegated to it expressly, or by necessary implication from statute.

2. The statute authorizing loans by the Interstate Stream Commission sets out two classes of permitted recipients, and three classes of acceptable purposes. The recipients must be either "irrigation or similar districts organized under the laws of the state," **or** municipalities and political subdivisions of the states." Section 75-38-28, N.M.S.A., 1953 Compilation), (P.S.).

Having found above that an acequia is a political subdivision of the state, we find necessarily that the statute expressly approves the lending of funds to an acequia provided that the acequia conforms in all necessary respects with the statutory scheme governing it, and that the purpose of the loan is one permitted by Section 75-38-28, *supra*.

3. In opinion of the Attorney General No. 58-169, a loan from this fund to a municipality for improvements to its water-works was upheld. The proceeds of the loan were to be applied to the repayment of an earlier loan to the municipal corporation by another state agency. In two immediately apparent ways, the loan here proposed is more directly and unmistakably within the purview of the statute than the one upheld in Opinion 58-169. Here, the political subdivision proposes to employ the funds for the improvement of commercial irrigation rather than for a non-irrigation water use, like water-works of a municipality. Furthermore, there is a direct application of funds in the acequias proposal, while the municipality for which a loan was upheld intended to serve a construction purpose more indirectly by repaying an earlier loan already used to accomplish the construction. The case of **Yeo v. Ulibarri**, 34 N.M. 184, 279 Pac. 509, sets out a liberal rule for acceptable uses of the Permanent Reservoirs for Irrigation Purposes Income Fund, which is the source of funds for the Irrigation Works Construction Fund. The Court recognized the use of such funds for loans for feasibility studies of dams or storage projects, exploration for reservoirs or dam sites, or rebuilding of existing reservoirs. In substance, it recognized the propriety of any use involving the promotion

of irrigation. In harmony with this case and relying upon it is the subsequent opinion of the Attorney General No. 3669, dated February 12, 1923, pointing out that the loan fund was intended for irrigation purposes and that consistent with the statute, ditches might be constructed to fill reservoirs, streams might be dammed, or water developed in whatever means could be done. A later Attorney General's Opinion, No. 3763, dated March 21, 1924, approved a loan from this fund to a single landowner for the drilling of water wells on his privately owned land. On the basis of these authorities we conclude that the purpose proposed here is consistent with statute.

4. The power of the acequias to borrow is established both by necessary implication from the power of the Interstate Stream Commission to lend to them, and from the general power of political subdivisions of the state to incur indebtedness necessarily or reasonably related to their statutory powers and functions. It is recognized in Opinion of Attorney General 58-169: "This involves the issue of whether the municipality can **lawfully borrow** the money in question. Loans are authorized by Section 75-34-28, N.M.S.A., 1953 Compilation to municipalities for the purpose in question. Section 75-34-32, N.M.S.A., 1953 Compilation. While these statutes do not in express terms authorize municipal borrowing thereunder, we think any other construction would not only be unduly strict, but would be absurd. Such construction would amount to giving with one hand and taking away with the other. Nor should Section 75-34-33, N.M.S.A., 1953 Compilation, be ignored, since it exempts loans from the Bateman Act. The latter, being a restriction on the power of municipalities to borrow, is made inoperative here."

This opinion is buttressed by many cases. "A municipal corporation may incur indebtedness or create obligations binding on it when and only when the power to do so is expressly conferred by constitution, statute, or charter or is **necessarily or reasonably implied from the powers expressly granted, or is essential to the objects for which the corporation was created.**" CJS Mun. Corp. 1833. The borrowing of funds by a community ditch, to improve, rehabilitate or extend its facilities for irrigation is, we believe, necessarily implied from the powers granted to it by statute. These include the maintenance and proper conduct of community ditches (75-14-21) as well as the power to extend, reconstruct and change the location of ditches (75-14-53).

5. Section 75-14-53, N.M.S.A., 1953 Compilation, provides that the cost of the alteration, change of location, enlargement or extension of ditches "shall be borne pro rata by those beneficially interested in same." While this formula is perhaps a little vague, it is, we believe, clarified by the analogous provisions of 75-14-21:

"The commissioners . . . shall have power . . . to make all necessary assessments to provide funds for the payment of the salary of the mayordomo and other legitimate expenses incidental to the proper conduct and maintenance of the acequias under their charge."

We believe that these provisions, taken together clearly entitle the commissioners to make an assessment for the repayment of a loan directed to the change of location, expansion or reconstruction of a community ditch. Supporting this position we cite the

New Mexico Supreme Court case of **State ex. rel. Sanchez v. Casados, et al.**, 27 N.M. 555, 202 Pac. 987, holding that water users may be assessed by the Commissioners of an acequia for proportionate shares of the costs of a lawsuit brought by the commissioners on behalf of the acequia. The court here expressly states that the statutory provision for assessments for costs of "conduct and maintenance of the acequias under their charge" is not limited to repairs, cleaning, and rebuilding of the ditch but extends to such other expenses as a lawsuit properly brought by commissioners on behalf of the acequia.

The Attorney General's Opinion cited above in answer to sub-question 1 is also relevant here:

"The community ditch corporation . . . has the power to tax the holders of water rights for services and improvements." Attorney General Opinion No. 1939-40, p. 138.

For the reasons recited herein, we conclude that the New Mexico Interstate Stream Commission does have the power to make loans to Community ditches from the Irrigation Works Construction Fund. In addition to the conditions precedent to such loans previously stated, it is apparent that the Commission must exercise banker's judgment in evaluating the necessity of specific loans and the repayment ability of applicants.