

Opinion No. 91-07

July 1, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Daniel Yohalem, Elizabeth A. Glenn, Assistant Attorneys General

TO: The Honorable John H. Underwood, State Representative, 229 Rio Street, Ruidoso, NM 88345

QUESTIONS

1. Is an intercommunity water supply association composed solely of two incorporated villages a public body subject to the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (Repl. Pamp. 1990)?
2. Is this water supply association subject to the Procurement Code, NMSA 1978, §§ 13-1-1 to -199 (Repl. Pamp. 1988 & Cum. Supp. 1990)?

CONCLUSIONS

1. An intercommunity water supply association composed solely of two incorporated villages for purposes of securing an adequate and economic supply of water for the residents of the villages is, under the facts presented here, a public body subject to the Open Meetings Act.
2. The Association qualifies as a local public body subject to the Procurement Code.

FACTS

By separate identical resolutions adopted on November 25, 1964, the incorporated Villages of Capitan and Ruidoso established the Eagle Creek Inter-Community Water Association ("the Association")

for the purpose of acquiring a water supply system to furnish, supply and provide water for the use of such villages from sources in, upon, along Eagle Creek within the State of New Mexico....¹

The Association's articles of incorporation provide, among other things, that: 1) the membership of the Association is to consist of the Villages of Capitan and Ruidoso, 2) pipelines shall extend from the water supply to the Villages of Capitan, Ruidoso and to the Fort Stanton Medical Center, Lincoln County New Mexico, and 3) in addition to funds raised from the sale of water, "each of the members of the association shall provide funds for the necessary expenses of the association...." Certificate of Association, arts. IV, V (Nov. 25, 1964). The two Resolutions further spell out the

composition and powers of the Association. Each Village Board of Trustees is to appoint three persons to serve as commissioners of the Association

on behalf of [each] Village with full power and authority to act in [each Village's] place and stead in establishing an effective intercommunity water supply organization....

Resolutions, id. at 2, Para. 2.

ANALYSIS

1. The Open Meetings Act.

The Open Meetings Act applies to "any board, commission or other policy-making body of any state agency, any agency or authority of any county, municipality, district or any political subdivision." NMSA 1978, § 10-15-1(B)(Repl. Pamp. 1990). The public policy behind the Open Meetings Act indicates that the Act is to be given a broad interpretation:

In recognition of the fact that a representative government is dependent on an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.... All meetings of any public body...shall be public meetings....

Id. § 10-15-1(A).

The Association is a creature of statute. The statutes governing water associations provide that

[a]ny combination of two or more municipalities ... shall have the power by joint or concurring resolution ... to organize an association for the purpose of acquiring a water or natural gas supply system.

NMSA 1978, § 3-28-1 (Cum. Supp. 1990).² The directors of an association are the commissioners appointed by the municipalities' governing bodies and they serve at the pleasure of those governing bodies. Id. § 3-28-2. The directors are empowered to make and alter bylaws or rules and regulations for the management and operation of the works of the association, and are charged with control and conduct of the association's business and affairs. NMSA 1978, § 3-28-8 (Repl. Pamp. 1984). By law, an association has the authority to purchase, acquire or construct water systems, issue revenue bonds to pay for these activities, and exercise the power of eminent domain. Id. §§ 3-28-10, 3-28-19 (Cum. Supp. 1990).

The Eagle Creek Inter-Community Water Association was created by the legislative action of the governing bodies of the Villages of Capitan and Ruidoso, and has considerable public authority over the creation, maintenance and distribution of water to

the two villages. See AG Op. No. 66-7 (1966) (characterizing an intercommunity gas association created under the same statute as the Association as a local public body subject to the Legislative Audit Act); AG Op. No. 63-147 (1963) (describing intercommunity water and gas associations as publicly owned municipal corporations). The Association's board of directors act "on behalf of" each village as its representative for purposes of providing a supply of water to the people of Capitan and Ruidoso. Particularly in light of the broad coverage intended for the Open Meetings Act, we believe that these features qualify the board as a "public body" and "policy-making body" of an authority or agency of the two villages subject to the requirements of the Open Meetings Act.

2. The Procurement Code.

"Except as otherwise provided," the Procurement Code applies "to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction." NMSA 1978, § 13-1-30(A) (Repl. Pamp. 1988). For purposes of the Code, a "local public body" is defined as "every political subdivision of the state and the agencies, instrumentalities and institutions thereof." *Id.* § 13-1-67 (Repl. Pamp. 1988). Intercommunity water associations are not included among the express exemptions from the Code. See *id.* § 13-1-98 (Cum. Supp. 1990).

Although the Association is a corporation separate from the villages which created it, we believe that it can fairly be described as an agency or instrumentality of the villages for purposes of the Procurement Code. According to one New Mexico case, a public agency characteristically is operated and managed by officers appointed by the government and is created by an act of the legislature. *Harrington v. Atteberry*, 21 N.M. 50, 61, 72, 153 P. 1041, 1045, 1049 (1915). See also *Raton Public Serv. Co. v. Hobbs*, 76 N.M. 535, 417 P.2d 32 (1966) (board of corporation operating city's electric utility system was a "governmental board" for purposes of open meetings law where stock of corporation was held by trustees in the name of the city, and its board of directors consisted of three members elected by the trustees, mayor of city and city commissioner). Other states' courts have used similar criteria to describe government instrumentalities. See, e.g., *Bergen County Auth. v. Hackensack Meadowlands Dev. Comm'n*, 324 A.2d 108, 110 (N.J. Super. Ct. Law Div. 1974) (although it was an independent public corporation, a sewer authority established by the county's governing board to carry out a delegated public purpose for the benefit of municipalities within the county was "an agency or instrumentality" of the county); *State ex rel. Eckles v. Woolley*, 726 P.2d 918, 923 (Or. 1986) (describing a governmental instrumentality as "a corporation for a public purpose..., an instrument of the government with certain delegated powers, subject to the control of the legislature, and its members officers or agents of the government for the administration or discharge of public duties"). Cf. *Cole v. City of Las Cruces*, 99 N.M. 302, 305, 657 P.2d 629, 632 (1983) (private natural gas association was not "so organized and controlled, and its affairs so conducted, as to make it merely an instrumentality or adjunct of a municipality" under the Tort Claims Act).

As discussed above, the Association was established by resolutions of the Villages of Capitan and Ruidoso as a nonprofit corporation to supply water to the villages. The Association's commissioners are appointed by and serve at the pleasure of the villages' boards of trustees. Under the Resolutions adopted by each village, the commissioners act on behalf of the villages and in their stead to establish an effective water supply organization. The villages are the Association's only members and provide funding for the Association's necessary expenses. Based on the extent of the villages' interest in and control over the management of the Association, and the availability of municipal funds to pay the Association's expenses, we believe the Association qualifies as a "local public body" for purposes of the Procurement Code. See also AG Op. No. 66-7 (1966) (concluding that an intercommunity gas association was subject to the former Public Purchases Act).

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) "Resolution Appointing Commissioners for the Purpose of Organizing an Inter-Community Water Supply Association," adopted, signed and approved by the Village of Capitan, New Mexico on November 25, 1964, p. 1; "Resolution Appointing Commissioners for the Purpose of Organizing an Inter-Community Water Supply Association," adopted, signed and approved by the Village of Ruidoso, New Mexico on November 25, 1964, p. 1 ("Resolutions").

[n2](#) Although the Eagle Creek Inter-Community Water Association predates the current statute, the present law validates associations formed under predecessor provisions. NMSA 1978, § 3-28-22 (Cum. Supp. 1990).