

Opinion No. 40-3432

February 21, 1940

BY: FILO M. SEDILLO, Attorney General

TO: Hon. John J. Dempsey, Member of Congress, New House Offices Building, Washington, D. C.

{*138} I received your letter of February 13th wherein you enclosed copies of correspondence received from the Project Control Division of the Works Progress Administration and Mr. Connelly, State Administrator of that governmental agency with regards to eligibility of a community ditch of New Mexico to sponsor a Works Project Administration project.

It seems that the Project Control Division of the Works Progress Administration in disapproving a community ditch project has done so due to the fact that they believe that the structural organization of a community ditch in New Mexico would preclude its acceptance within the interpretation of a governmental agency or political subdivision of the state since they feel that the ownership of a community ditch is vested in the respective shareholders and appears to possess the elements of a private non-profit corporation; that the community ditch profit would accrue primarily to private individuals rather than to the general public.

Section 151-401, New Mexico Statutes, Annotated, 1929 Compilation, provides as follows:

"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."

Section 151-414, New Mexico Statutes, Annotated, 1929 Compilation, provides as follows:

"All community ditches or acequias shall for the purposes of this article be considered as corporations or bodies corporate, with power to sue or to be sued as such."

With regards to community ditches in *Candelaria vs. Vallejos*, 13 N.M. 146, the court held that community ditches under New Mexico statutes belong to a class of corporations known as public and voluntary quasi corporations public in nature and use. This character of corporation, which is discussed in *Elmer vs. Drainage Commissioners*, 135 Ill. 269, was set out in the above case and said as follows:

"In regard to public and voluntary quasi corporations the rule is otherwise and there is no such implied liability imposed upon them. These later -- such as counties, townships, school districts, and other similar quasi corporations -- exist under general laws {*139} of the state which apportion the territory its local subdivisions for the purpose of civil and

governmental administration and impose upon the people residing in several subdivisions precise and limited public duties and clothe them with restricted corporate functions co-extensive with the duties devolved upon them. In such organizations the duties and their correlative powers are assumed in invitum."

The court further held that the character of a community ditch is very different from a voluntary corporation organized for gain wherein a majority of the stockholders and the board of directors chosen by such stockholders are invested by law with wide discretion and ample powers to the management and alienation of the property of the corporation. There the interests of individuals formerly held in severalty become fused into one body known as the corporate property and the individual holdings become merged into subdivisions of stock. Here, however, the community ditch was no voluntary organization; the owners of these lands and the water rights appurtenant thereto were not given leave to incorporate, as a preliminary to which they deeded their several holdings to the corporation. On the contrary, the legislature for the purpose purely of more conveniently and economically distributing the water upon such lands and thus perhaps leaving by such economical use an overplus for new appropriations decided to make corporations out of each of the ditches.

Further, the court held that the sole effect of the community ditch acts was to create public corporations with power restricted simply to the exercise of those functions necessary to the ends of the law.

In *Land and Irrigation Company vs. Gutierrez*, 10 N.M. 177, the court held that it is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico and other western states where irrigation is necessary, is a public purpose. It was in this same case that the court held that no longer can there be such a thing as private ownership of the waters of public streams; that all right obtainable in such water is a right to appropriate so much thereof as is actually used for some beneficial and legal purpose.

The same is true of community ditches. All right obtainable in the water of community ditches is the right to appropriate such thereof as is actually used for a beneficial purpose.

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 a 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.

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 function to the benefits which accrue to the farmers similar to the benefits which accrue to the dwellers in cities from 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.

Trusting that the foregoing gives you the information you desire and with kindest personal regards and best wishes to you, I am,