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December 27, 1990

OPINION
OF
HAL STRATTON
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Opinion No. 90-30

BY: Carol A. Baca
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TO: The Honorable Harroll Adams
State Auditor
PERA Building, Rm. 302
Santa Fe, NM 87503

QUESTION:

Are the following entities subject to audit under the New Mexico Audit Act: (a) water and sanitation districts created pursuant to the Water and Sanitation District Act, NMSA 1978, Sections 73-21-1 to 73-21-54 (Repl. Pamp. 1987); (b) acequias and community ditch associations subject to NMSA 1978, Sections 73-2-1 to 73-2-64; (c) and associations created pursuant to the Sanitary Projects Act, NMSA 1978, Sections 3-29-1 to 3-29-19 (Repl. Pamp. 1984).

CONCLUSION:

Yes.

ANALYSIS:

Section 12-6-3(A) of the Audit Act, NMSA 1978, Sections 12-6-1 to 12-6-14 (Repl. Pamp. 1988) provides that "[t]he financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of his office designated by him or by independent auditors approved by him." As used in the Audit Act, "agency" means:

any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate courts, district attorneys and charitable institutions for which appropriations are made by the

legislature; every political subdivision of the state, created under either general or special act, which receives or expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions; municipalities; drainage, conservancy, irrigation or other special districts; school districts; and every office or officer of any of the above.

Id. Section 12-6-2 (emphasis added). After examining the legislature history and other language used in the Audit Act, AG Op. No. 87-65 (1987) concluded that this definition includes all local public bodies that handle public funds and should be construed liberally to apply to a wide range of public entities.

It is well-established that the legislature has the authority to create political subdivisions, in addition to counties, municipalities and school districts, for a public purpose. Albuquerque Met. Arroyo Flood Con. A. v. Swinburne, 74 N.M. 487, 495, 394 P.2d 998, 1003 (1964). Gibbany v. Ford, 29 N.M. 621, 626, 225 P. 577, 579 (1924), defined a political subdivision as "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." Irrigation districts, for example, have been held to be a political subdivisions because, among other reasons, there is a legislative declaration in NMSA 1978, Section 73-13-44 that they are "bodies corporate and politic." Tompkins v. Carlsbad Irr. Dist., 96 N.M. 368, 370, 630 P.2d 767, 769 (Ct. App. 1981).

The Water and Sanitation District Act states that water and sanitation districts "shall be a governmental subdivision of the state, except a district created pursuant to a petition signed by the chairman of the board of county commissioners of a county, which shall be a subdivision of the county." Section 73-21-9(I). Moreover, Section 73-21-17 provides that in addition to other means that the Act affords such districts for revenue raising, a district's board of directors has the power to levy and collect ad valorem taxes on and against all taxable property within the district. The New Mexico Supreme Court has said that the authority to impose ad valorem property taxes is "at the core of governmental sovereignty." Petition of Lower Valley Water & Sanitation, 96 N.M. 532, 537, 632 P.2d 1170, 1175 (1981). We conclude that water and sanitation districts are subject to the Audit Act because they are political subdivisions of the state, county institutions or offices, or special districts within the meaning of Section 12-6-2.

Acequias and community ditch associations subject to Sections 73-2-1 to 73-2-64 are unquestionably covered by the Audit Act. In Section 73-2-28 the legislature has "declared" expressly that acequias and community ditch associations are "political subdivisions of this state."

An association created under the Sanitary Projects Act is defined as a "body corporate" in Section 3-29-15(A). There are, however, some suggestions in the statutes that such associations may be governmental entities. For example, Section 3-29-6 provides that the associations have the right of eminent domain.¹ Section 3-29-15(B) also states that they have "power to become indebted or issue bonds in the form approval by the attorney general." Finally, NMSA 1978, Section 41-4-13 (Repl. Pamp. 1989), a provision of the Tort Claims Act, states that "[a]ll community ditches or acequias and all associations created pursuant to the Sanitary Projects Act are hereby excluded from the waiver of immunity under Sections 41-4-6 through 4-4-12 NMSA 1978."

Section 41-4-13 persuades us that associations created under the Sanitary Projects Act are governmental entities subject to the Audit Act. The common law doctrine establishing governmental immunity for tort actions was abolished in Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975). The New Mexico legislature responded to Hicks in the following year by passage of the Tort Claims Act. This Act generally reinstated governmental immunity except in the case of eight classes of activities for which immunity is waived and which are set forth in Sections 41-4-5 through 4-4-12.² Section 41-4-2- of the Act also provides in part: "[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act." Inasmuch as Section 41-4-13 purports to reinstate governmental immunity for associations created under the Act, except as waived in Section 41-4-5, it is clear that the legislature regarded such associations as governmental entities.

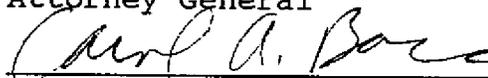
¹The power of eminent domain would not, in itself, be conclusive proof that the associations are governmental entities. While water and sanitation districts, acequias, community ditch associations and other governmental entities have the power of eminent domain, so do public utilities. See, e.g., NMSA 1978, Sections 42A-1-1 to 42A-1-34 (Repl. Pamp. 1981), Section 62-1-4 (Repl. Pamp. 1984), Section 73-21-16 (Repl. Pamp. 1987).

²See Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1986), for a history of the Tort Claims Act.

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