

Opinion No. 88-30

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OPINION OF: HAL STRATTON, Attorney General

BY: Scott Spencer, Assistant Attorney General

TO: Thomas C. Garde, District Attorney, Thirteenth Judicial District, Post Office Box 669, Bernalillo, New Mexico 87031

QUESTIONS

Whether or not monies raised from a tax levy from a County Flood fund can be used for the purpose of diverting waters from within the municipal limits of the City of Rio Rancho, which is within five miles of the Rio Grande River, which waters to be diverted contribute to or are subject to flood conditions destructive of property or dangerous to human life?

CONCLUSIONS

Yes, if the diversion of waters is from a river or stream, including the Rio Grande River, in the drainage area where the taxes were assessed.

ANALYSIS

In order to protect the state from the destructive power of flooding, the legislature has authorized counties to levy property taxes to be used for flood control. Sections 4-50-1 to 4-50-9 NMSA 1978. Section 4-50-2 provides, in pertinent part:

A board of county commissioners, upon certification of the need and estimated cost by the county flood commissioner, may contract to borrow funds through state or federal agencies for flood control purposes and may levy an annual tax ... of all the taxable property located within five miles of both sides of any river or stream which contributes to or is subject to flood conditions destructive to property or dangerous to human life. Such taxes shall be levied and collected for the purpose of creating a fund which shall be used to construct and maintain dikes, dams, embankments, ditches or other such structures or excavations necessary to prevent flood waters from damaging property or human life within such counties or to repay, according to their terms, any state or federal loans obtained from flood control purposes. Such tax shall be assessed, levied and collected as other taxes are collected and when so collected shall be known as the "county flood fund," and such fund shall be maintained in such a manner as to keep separate records of all flood control taxes collected from each stream or river drainage area. The taxes collected shall only be used and disbursed for flood control projects in the drainage area for which they were assessed in accordance with the provisions of

Sections 4-50-1 through 4-50-9 NMSA 1978 and shall not be transferred to any other fund or purpose.

(Emphasis added.) Section 4-50-3 provides, in pertinent part:

County flood commissioners may inspect rivers and streams in their respective counties where flood waters are liable to cause damage to property or life and in their discretion cause to be constructed and maintained dikes, embankments, dams, ditches or other structures or excavations necessary to control such flood water and protect life and property in their counties against loss and damage.... If the money in the county flood fund is insufficient to finance flood control projects and provide for maintenance, the board of county commissioners, upon the recommendation of the county flood commissioner, may contract with any federal or state agency for grants or loans for the purpose of construction and maintenance of dikes, dams, embankments, ditches and other structures and excavations.

(Emphasis added.)

These sections limit the levy of county flood taxes and use of county flood funds. The county may tax only property located within five miles of both sides of any river or stream that contributes to or is subject to flood conditions. The county may provide flood control measures only when necessary to control and prevent flooding caused by rivers and streams in order to protect life and property in the county. Finally, the county may disburse and use only taxes for flood control projects within the drainage area for which they were assessed. The statute does not authorize or permit any other purposes.

These sections also limit flood control projects to rivers and streams. A "river" or "stream" is a natural watercourse which by its flow assumes a definite and natural channel having a bed or banks, and usually discharges itself into some other stream or body of water. *Jaquez Ditch Company v. Garcia*, 17 N.M. 160, 124 P. 891 (1912). It does not cease to be a river or stream because at a certain point it spreads over an area for a distance without defined banks before flowing again into a definite channel. Contrary to the eastern rule, it sometimes may be dry. *Id.* at 164.

Municipalities also may levy taxes for flood control. The second issue raised is whether counties may provide for flood control in municipalities that have levied a tax for flood control. Section 3-41-2 NMSA 1978 reads in relevant part:

A. A municipality may levy a tax upon all property subject to property taxation within the municipality for such length of time as is necessary to accomplish the purpose authorized in Sections 3-41-1 and 3-41-3 NMSA 1978....

B. Before levying the tax, the municipality shall submit to the qualified electors of the municipality the question of levying the taxes....

...

F. If a county has levied a tax for flood control purposes as authorized in Sections 4-50-1 through 4-50-9 NMSA 1978 or any other law, the municipality is not prohibited from levying a tax as authorized in this section.

In construing the meaning of the statutes in question, the central concern is to determine and give effect to the intention of the legislature. *Smith Machinery Corp. v. Hesston, Inc.*, 102 N.M. 245, 246, 694 P.2d 501, 502 (1985). Statutes should be construed consistently with other laws that address the same subject matter. *E G & G Inc. v. Director, Revenue Division, Taxation & Revenue Dept.*, 94 N.M. 143, 146, 607 P.2d 1161, 1164 (1979). The legislative intent of Sections 3-41-2F, 4-50-2 is to control flooding. If we construe Section 3-41-2F to limit the county in which the municipality sits from levying a flood control tax within that municipality, we would prohibit counties from effectively protecting other parts of the county in the same drainage area from the effects of flood water and would frustrate the purpose of Section 4-50-2. These statutes must be read together so that effect may be given to both. Therefore, Section 3-41-2 cannot be read to prohibit the county in which the municipality sits from controlling flood waters within that municipality. See also *Continental Oil Co. v. City of Santa Fe*, 36 N.M. 343, 15 P.2d 667 (1932) (holding that a municipality could impose an excise tax even where the state imposed an excise tax.)

Also, Section 3-41-5B NMSA 1978 authorizes a municipality to cooperate with any county or flood control authority. If we construed Section 3-41-2 to mean that the county could no longer act within the municipality, Section 3-41-5B would be superfluous.

It is therefore our opinion that Sandoval County may use county flood funds to construct flood control structures located within the county and within the drainage area as set forth in Section 4-50-2, when necessary to prevent flood waters from rivers or streams from damaging life and property, even if the structures lie within the Rio Rancho city limits.

ATTORNEY GENERAL

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