

Opinion No. 88-32

May 2, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Scott Spencer, Assistant Attorney General

TO: The Honorable Don Silva, State Representative, 8328 Cherry Hills Drive, NE, Albuquerque, NM 87111

QUESTIONS

1. Is the Middle Rio Grande Conservancy District Board required to collect the one-fourth (1/4) payment of those "past" tolls and charges from the Class A water users for the time period that the statute has been in effect?
2. Is there any kind of statute of limitations applicable with regard to collection of those tolls or charges from the Class A water users?
3. If any portion or all of the water tolls and charges still must be collected from the Class A water users, what would be the appropriate procedure and who might be the appropriate agency or individual to pursue the collection of those water tolls and charges?
4. Assuming that the minimum one-fourth (1/4) of the tolls and water charges have been improperly collected from the Class B users over any of the aforementioned time periods, would the Class B taxpayers be entitled to a refund of those amounts for a particular time period?

CONCLUSIONS

1. Yes, either pursuant to an action on water user contracts or by assessment and levy pursuant to Section 73-18-14 NMSA 1978.
2. Yes, ten years if the District Board adds the tolls and charges to the user's assessment and levy, four years if the Board brings suit on an unwritten contract, and six years if it brings suit on a written contract.
3. The Middle Rio Grande Conservancy District Board.
4. Not unless the taxpayer files a timely protest and it is upheld by the District Board or the Conservancy Court if appealed.

ANALYSIS

Section 73-18-8(A) NMSA 1978 requires the Board of the Middle Rio Grande Conservancy District ("District") to estimate not later than July 1 of each year the funds required to meet the District's obligations and needs in the ensuing year. Those obligations include the payment of interest upon bonds, payments to the United States pursuant to contract, and:

Item 3. The portion of the expense of operation and maintenance of the irrigation and drainage system to be collected by assessment and levy. This portion shall not be less than one-fourth nor more than three-fourths of the estimate for such operation and maintenance costs, including the funds required to be advanced to the United States for operation and maintenance of the irrigation and drainage systems in accordance with the provisions of the reclamation contract for the ensuing year, and shall be determined by the board from year to year, and that part thereof apportioned as in this act [73-18-1 to 73-18-24 NMSA 1978] provided for assessment and levy upon Class "A" real property shall be so assessed and levied against each acre thereof, pro rata, whether irrigated or not and the same when collected shall be applied to the cost of operating and maintaining the irrigation and drainage systems. **The remainder of said total amount estimated for the expense of operation and maintenance for the ensuing year shall be paid as tolls or charges by those actually using said irrigation and drainage systems and water in accordance with the terms of their respective contracts for water.**

(Emphasis added.) By letter dated September 15, 1986 to Senator Tito Chavez, this Office interpreted this provision to impose a mandatory, non-discretionary duty on the Board to collect by assessment and levy at least one-fourth but not more than three-fourths of the estimated cost of operating and maintaining the irrigation and drainage system. The Board adds the amount to be raised by assessment and levy for operation and maintenance expenses to the amount estimated to pay all obligations (e.g., interest on bonds and payments to the United States). The Board then apportions the total amount between Class "A" and Class "B" property in accordance with the percentages it has established pursuant to Sections 73-18-7 and 73-18-8(D) NMSA 1978.¹ The remainder of the total amount needed to meet operation and maintenance expenses shall be paid as tolls and charges by those actually using the irrigation and drainage systems and water by contract.

1. We assume, but do not decide, that the Board has not complied with its statutory mandate to fix, assess, or collect as tolls and charges at least one-fourth of the amount needed for operation and maintenance from those actually using the irrigation and drainage system and water. The first issue is whether the Board has a duty to collect tolls and charges from past years that remain uncollected. We find that the Board does have such a duty.

Section 73-18-14 NMSA 1978 authorizes the Board to collect certain tolls and charges in addition to those that Item 3 of Section 73-18-8(A) requires. However, the second paragraph of Section 73-18-14 provides:

Whenever any tolls and charges for the use of water have been fixed by the board of a contracting district it shall be lawful to make the same payable in advance and in case any such tolls and charges remain unpaid or any balances for water delivered by measurement are unpaid at the time specified for levying the annual assessment, the amount due for such tolls and charges or balances may be added to and become a part of the assessment levied upon the land [on] which the water for which such tolls, charges or balances are unpaid, was used. **Any land which may have escaped assessment for any year or years shall, in addition to the assessment for the then current year, be assessed for such year or years with the same effect and with the same penalties as are provided for the current year and any property delinquent for any year may be correctly assessed during the current year for any expenses caused to the contracting district on account of such delinquency.**

(Emphasis added.) As set forth above, Section 73-18-8A, Item 3, expressly states that system or water users shall pay, through tolls and charges, at least one-fourth of the operation and maintenance costs of the District's irrigation and drainage system. The first full sentence of the second paragraph Section 73-18-14 gives the Board discretion to make tolls and charges payable in advance. If at the time of the annual assessment tolls and charges remain unpaid, then the Board "may" add them to and make them a part of the annual assessment.

In statutory interpretation, "may" is permissive and "shall" is mandatory. Section 12-2-2(l) NMSA 1978. Two statutes should be construed together to preserve the objects to be obtained by each if no contradiction or unreasonableness will result. *State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth.*, 76 N.M. 1, 18, 411 P.2d 984, 996 (1966). Using this analysis, the use of "may" in Section 73-18-14 does not diminish or eliminate the duty that Section 73-18-8A, Item 3 imposes on the Board to collect tolls and charges from water users, nor does the language in Section 73-18-14 affect the Board's duty to collect for past tolls and charges from water users that remain unpaid. If we construe "may" in Section 73-18-14 to give the Board discretion to collect all tolls or charges, including those required by Section 73-18-8A, Item 3, then the users could escape paying their legislatively mandated share of the costs under that section.

Furthermore, the Board would be subject to mandamus to compel it to fix and collect uncollected tolls and charges from previous years within the limitations period discussed below. See *State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n*, 79 N.M. 357, 443 P.2d 850 (1968) (mandamus will lie to compel tax commission to perform legal duty to provide a uniform assessment percentage ratio for use in all counties for ad valorem tax purposes); *Territory ex. rel. Parker v. Mayor*, 12 N.M. 177, 76 P. 283, (1904) (mandamus will lie against a city council and mayor to compel a tax levy). In *Gray v. City of Santa Fe*, 89 F.2d 406 (1937), the United States Court of Appeals for the Tenth Circuit held that a municipal improvement bond holder could compel a city to collect special assessments for his benefit:

Where no assessment has been made but the power to assess still remains, or where an invalid assessment has been made but the power to reassess exists, or where an

assessment has not been collected when due but the assessment still exists and may be collected, the remedy of the certificate holder or bondholder for the lack of diligence on the part of the city officials is mandamus to compel them to assess or reassess and enforce collection.

Id. at 411. (citations omitted). It is therefore our opinion that the Board has a non-discretionary duty to fix and collect past due tolls and charges for at least one-fourth the annual operation and maintenance cost pursuant to Section 73-18-8A, Item 3. The District may collect at least one-fourth of past expenses for operation and maintenance from users by an action in contract, or it may utilize Section 73-18-14's assessment and levy procedures.

2. The applicable statute of limitations depends on the type of collection method the Board chooses: action on contract, or assessment and levy. Section 7-38-81.1 NMSA 1978 provides as follows:

A. Property may not be sold and proceedings may not be initiated for the collection of any levy or assessment in the form of property taxes levied or assessed under the provisions of Section 73-14-1 through 73-18-43 NMSA 1978 that have been delinquent for more than ten years.

B. Property that has not been included on a property schedule or a levy or assessment schedule may not be subjected to the imposition of any levy or assessment in the form of property taxes levied or assessed under the provisions of Sections 73-14-1 through 73-18-43 NMSA 1978 for more than ten years immediately preceding the date of its entry on the property tax schedule or levy or assessment schedule.

C. Any levy or assessment in the form of property taxes levied or assessed under the provisions of Sections 73-14-1 through 73-18-43 NMSA that has been delinquent for more than ten years, together with any penalties and interest, is presumed to have been paid. The county treasurer or appropriate conservancy district officer shall indicate on the property tax schedule or levy or assessment schedule that all such levies or assessments in the form of property taxes and any penalties and interest have been "presumed paid by act of the legislature."

This section establishes a ten-year statute of limitations for collecting levies and assessments "in the form of property taxes." Section 73-18-10 NMSA 1978, after discussing assessments to meet the debt owed to the United States, characterizes Section 73-18-14 levies and assessments as property taxes:

[E]very other assessment hereafter levied upon any real property within the district under the provisions of this act [73-18-1 to 73-18-24 NMSA 1978], is and shall be a lien upon the property against which such assessment is levied. All such assessments shall be collected, and all such liens shall be enforced in the same manner as assessments of taxes for state and county purposes are collected and the liens there of are enforced.

If the Board elects, pursuant to Section 73-18-14, to add unpaid tolls and charges to the current year's assessment, they become "property taxes" for purposes of Section 7-38-81.1, and the ten year limitations period applies.

If the Board elects to collect unpaid tolls and charges by way of a contract action, the general limitation periods for contract actions would apply. Assuming that the contracts to which Section 73-18-8, Item 3 refers are unwritten, Section 37-1-4 NMSA 1978 requires the Board to bring an action within four years of the user's failure to pay. See *Akre v. Washburn*, 92 N.M. 487, 489, 590 P.2d 635, 637 (1979). If the contracts are written, Section 37-1-3 NMSA 1978 requires the Board to bring an action within six years of the breach.

3. Section 73-18-14 provides that the Board may add past due tolls and charges to the current year's assessment. Section 73-18-8(B) NMSA 1978 provides that Class A property shall be assessed on a "pro rata per acre" basis. Section 73-18-9(B) NMSA 1978 states, in part, that "[i]t shall be the duty of the district treasurer to collect and receipt for all per acre assessments levied as herein provided in accordance with the resolutions and orders of the board of directors of the district." It is therefore our opinion that, if the Board adds past due "tolls and charges" to the current year's assessments, the district treasurer shall assess and collect them on a "per acre" basis. If the Board elects to proceed in contract, the District has standing as plaintiff to enforce those contracts.

4. Assuming that the Board previously has failed to collect tolls and charges from the system or water users, then the Board must have met its operation and maintenance expenses by assessing Class B land at an excessive rate. Sections 73-18-8(C) and (D) set forth the procedure to remedy improper assessments. Section 73-18-8(C) requires the Board to provide an opportunity for persons to show why a tract or parcel of property should not be "so assessed." The Board may request an investigation, after which it must determine the propriety of the assessment. Section 73-18-8(D) allows a taxpayer to appeal the Board's decision to the conservancy court within thirty days of the decision.

A taxpayer's failure to exhaust those administrative remedies would bar him from suing in conservancy court to challenge an assessment. See *Albuquerque Gun Club v. Middle Rio Grande Conservancy Dist.*, 42 N.M. 8, 9, 74 P.2d 67, 67 (1937) (conservancy court had no jurisdiction to hear appeal not taken within thirty days). In *State v. Robinson*, 101 Ohio App. 516, 138 N.E.2d 317 the Ohio Court of Appeals held that even if a levy was illegal, a county treasurer had a legal duty to pay over to a conservancy district funds collected pursuant thereto. The court reasoned that since no taxpayer filed a written protest or suit against the conservancy district, taxes illegally collected must be turned over to the district and the statute of limitations barred any claim for refund that the taxpayers may have had. See also *In re 1971 Assessment of Trinchera Ranch*, 85 N.M. 557, 514 P.2d 608 (1973) (taxpayers' failure to follow and exhaust administrative remedies precluded them from maintaining a suit to challenge an allegedly incorrect and erroneous assessment.)

Section 73-18-8 establishes no time limits for filing assessment protests with the Board. Therefore, as long as the Board previously has not decided the propriety of a particular assessment, it is our opinion that a taxpayer may file a protest at any time. However, the general statute of limitations found in Section 37-1-4 NMSA 1978 provides, "Any other action not herein otherwise provided for and specified must be brought within four years." Therefore, although a taxpayer may file a protest with the Board at any time, if he intends to challenge the Board's decision in conservancy court he must bring his suit within four years of the assessment at issue and within thirty days of the Board's determination.

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GENERAL FOOTNOTES

[n1](#) Section 73-18-6 NMSA 1978 divides all real property within the District into two classes for assessment purposes. Class "A" property embraces all irrigable lands in the district and must be assessed and levied upon annually at a uniform rate per acre. Class "B" property embraces all other real property in the district and is assessed on an ad valorem basis.