

May 18, 2004: County Ordinances relative to water and wastewater treatment facilities

The Honorable Mary Jane Garcia

New Mexico State Senate

P.O. Box 22

Doña Ana, NM 88032

RE: Mutual Domestic Water Associations.

Dear Senator Garcia:

This letter responds to your inquiry regarding county ordinances relative to water and wastewater treatment facilities created pursuant to the Sanitary Projects Act, NMSA 1978, Sections [3-29-1](#) through [3-29-19](#) (1965, as amended through 2001). Your specific inquiry was whether a county ordinance authorizing the provision of water and wastewater treatment services to an area as yet unserved by anyone would supercede an effort under the Sanitary Projects Act to provide the same service. We conclude that such an ordinance would not supercede the ability of a mutual domestic water consumers association created under the Sanitary Projects Act to provide the same service.

Under the Sanitary Projects Act a group of people may create a mutual domestic water consumer association with the authority to condemn land, build works and thus serve a defined geographic area. See §§ [3-29-4](#) (authority to build) and [3-29-6](#) (authority to exercise eminent domain). The membership in a sanitary project association is open to those within a community who desire to participate in the project. See § [3-29-11](#). The focus of the Sanitary Projects Act is on rural and unincorporated communities requiring sanitary domestic water facilities. Mutual domestic water associations are eligible for funds from the Sanitary Projects Fund. § [3-29-10](#).

Even if a county has promulgated an ordinance to allow it to provide water services to as yet unserved areas of the county, we conclude that such an ordinance would not preclude a mutual domestic water association from providing the same type of services to its community. As stated above, the Sanitary Projects Act specifically outlines the powers of a mutual domestic water association and allows relatively broad authority to effectuate its goals. The principles of statutory construction require harmonizing of the laws in order to effectuate the intent of the legislature. See *State v. Rue*, 72 N.M. 212 (1963). Thus, although the county may also have the authority to provide water to unserved communities within the county, we believe such authority would co-exist with the mutual domestic's statutory power to do the same.

We believe that actual provision of water systems is the determining factor here. Essentially, if the mutual domestic water consumers association is the first to provide or make substantial efforts to provide water for a community, the mutual domestic water consumer association then controls that part of the water provider system. If the county does the same, the county will control its part of the water system. By providing or making substantial efforts to provide the water, we assume that more action than merely adopting an ordinance or stating that such an organization will provide water will be needed to satisfy the standard. Rather we would expect proof to demonstrate the actual organization of a mutual domestic, appropriate follow-up steps taken, the actual construction of a water system, or similar indicia of serious efforts being made to provide the water.

Your request to us was for a formal Attorney General opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of an informal letter instead of an Attorney General opinion we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public. Thank you for your inquiry.

Sincerely,

Sondra Frank

Assistant Attorney General