

Opinion No. 41-3766

April 18, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. C. McCulloh Special Assistant Tax Attorney State Tax Commission Santa Fe, New Mexico

{*59} This will acknowledge receipt of your letter dated April 14, 1941, in which you request an opinion from this office as to whether or not the Lea County Water Company, Inc., should be taxed by the State Tax Commission as a public utility.

The corporate charter of said company authorizes the production of water "for use or sale to public, or for its own use." In this connection, it is well to point out that the mere authorization in the charter to perform a public service does not make the company ipso facto a public utility; the question of whether it is or is not a public utility depends not upon its powers, out upon its acts. See Public Utilities, 51 C.J. 4.

The question of whether a company is or is not a public utility is a judicial one, and the courts in attempting to define the phrase "public utility" have said that the essential requirement is that the company must in some way be impressed with the public interest.

The next question, then, is what constitutes "impressed with the public interest?" A business carried on under the authority of a public grant or privilege expressly or impliedly imposing an affirmative duty of rendering public service demanded by the public, is a business that is impressed with the public interest.

{*60} It is also said that a company in control of its property becomes a public utility only when and to the extent that its business and property are devoted to a public use. The use to be public must be fixed and definite, and the public as such must have an interest therein, such that it has a legal right to the use which cannot be denied or withdrawn at the will of the owner of the property involved. See Nichols vs. Central Virginia Power Company, 143 Va. 405, 13 S.E. 764, 44 A.L.R. 727. And also State vs. King County Super. Ct., 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, and Neitzel vs. Spokane International R. Company, 65 Wash. 100, 117 Pac. 864, 36 L.R.A. (NS) 522.

It seems to be well settled that an irrigation company that holds itself out generally to serve for compensation all who may apply for water within the area served by its irrigation system is not a mere private corporation but is affected with the public interest and is subject to regulation and control as a public service or quasi public corporation. See Allen vs. R. R. Commission, 179 Cal. 68, 175 Pac. 466, 8 A.L.R. 249, annotation in latter volume citing numerous New Mexico cases.

In view of the foregoing statements, it my opinion that our problem is one of fact, that is, whether or not the Lea County Water Company holds itself out as a company that will serve all requests for water within its area of operation. The statements of fact in your letter are incomplete, and for that reason I cannot say definitely whether or not said company constitutes a public utility.

Trusting that the foregoing sufficiently answers your question, I remain

By GEO. H. HUNKER, Jr.

Asst. Atty. General