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LETTER

Opinion No. 60-112-L

Original	GEORGE OGLESBY
Concur	LES HARDY
Concur	<i>[Signature]</i>

July 27, 1960

Honorable George F. Senner, Jr.
Chairman
Arizona Corporation Commission
State Capitol
Phoenix, Arizona

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ARIZONA ATTORNEY GENERAL
[Signature]

Dear Mr. Senner:

This is in answer to your letter of April 8, 1960, wherein you inquire as to the authority of the Corporation Commission to issue a Certificate of Convenience and Necessity to an applicant who desires to establish a public water company within the territorial limits of the Maricopa Water Conservation District No. 1. Since this district is declared by constitutional and statutory pronouncement to be a municipal corporation, the basic inquiry is whether such status in and of itself precludes the Commission from issuing certificates within its territory. In order to answer this question, we have reviewed the constitutional, statutory and case law pertaining to conservation or irrigation districts in this state and here set out the results of our research:

Statutory provision for the establishment of irrigation districts was first provided by the Legislature in 1921. That legislation was first codified in the Revised Code of 1928. Section 3424 thereof reads as follows:

"All irrigation districts heretofore or hereafter organized under the laws of the state of Arizona are hereby declared to have been and be municipal corporations for all purposes. Under all laws of the state of Arizona affecting or relating to irrigation districts such irrigation districts shall be deemed, held and construed to be municipal corporations in the construction and application thereof."

The first case to construe the status of irrigation districts under that law, and still a leading case upon the subject, is Day v. Buckeye Water, etc. Dist. (1925), 28 Ariz. 466, 237 Pac. 636. Therein the court made the following distinctions:

"Counties, cities, towns, and municipalities all belong to a class of subdivisions of the

state primarily established for what are commonly called political and governmental, as aside from business purposes. Any exercise of the latter function is merely incidental to their existence and in no way necessary for it. . . . On the other hand, irrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental. They are formed in each case by the direct act of those whose business and property will be affected, and for the express purpose of engaging in some form of business, and not of government. . . "

In a subsequent case, Ramirez v. Electrical Dist. No. 4, (1930) 37 Ariz. 360, 294 Pac. 614, the court further stated:

"The classification by our Constitution of different kinds of public corporations as 'municipal,' as is done in section 8, article 9, thereof, evidently was for the purpose of limiting the indebtedness of those public corporations whose functions more nearly assimilate those of a purely municipal character than those of irrigation districts. The latter are nothing much more than improvement districts entrusted with only sufficient taxing power to compel those directly benefited pecuniarily to contribute to the expenses thereof. They are organized for the specific purpose of providing ways and means of irrigating land within their boundaries and maintaining an irrigation system for that purpose."

In 1932, section 3424 of the 1928 code was amended in chapter 8, First Special Session, Laws 1931-1932 to read:

"All irrigation districts heretofore or hereafter organized under the laws of the State of Arizona are hereby declared to have been and be public corporations and political subdivisions of the State, and municipal corporations under Section 2, Article IX, Constitution of the State of Arizona. Under all laws of the State of Arizona, affecting or relating to irrigation districts, such districts shall be deemed, held

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and construed to be public corporations and entitled to all exemptions, rights and privileges of public and municipal corporations in the construction and application of such constitutional and statutory provisions, and all property of such district shall be public property."

The constitutional provision referred to in the amendment provides for exemption from taxation of all federal, state, county and municipal property.

After the 1932 amendment, the next case to construe the status of irrigation districts was Maricopa County Municipal Water Conservation District No. 1 v. La Prade, (1935) 45 Ariz. 61, 40 P.2d 94, 100. Therein, Chief Justice Lockwood who had written the opinion in the Day case, again inquired into the nature of irrigation districts, saying:

"What, then, is the nature of an irrigation district under our laws? That it is a public, instead of a private, corporation established by the legislature for a public use cannot be questioned, for otherwise it could not exercise the right of taxation, and compel unwilling landholders within its limits to subject their lands to such taxation. (citing cases)

"But is it also a political subdivision of the state? The decisions on this point, even in the same jurisdictions, are in hopeless conflict

"Districts of the kind involved in this proceeding therefore belong to that class of organizations, once rare but becoming more and more common, established for the pecuniary profit of the inhabitants of a certain territorial subdivision of the state, but having no political or governmental purposes or functions. In some respects these organizations are municipal in their nature, for they exercise the taxing power, the greatest attribute of sovereignty, and can compel the inclusion of :

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unwilling landholders within their bounds. In other ways they resemble private corporations, for they are liable for the torts of their servants in the same manner and to the same extent, and indeed generally have the same rights and responsibilities. Probably the best definition we can give then is to say that they are corporations having a public purpose, which may be vested with so much of the attributes of sovereignty as are necessary to carry out that purpose, and which are subject only to such constitutional limitations and responsibilities as are appropriate thereto."

Thus, notwithstanding the 1932 legislative pronouncement that irrigation districts were both municipal corporations and political subdivisions of the state, the Supreme Court of this state refused to classify them as either and in effect classified them as quasi-municipal corporations vested with those attributes of sovereignty necessary to carry out their mission as irrigation districts.

In 1940, the Supreme Court was again called upon to expound upon the status of Irrigation Districts in the case of State v. Yuma Irr. Dist., 55 Ariz. 178, 99 P.2d 704. The precise question that the court was called upon to determine was whether the legislature possessed the power to grant to irrigation districts exemption from taxation as it had sought to do in the 1932 amendment. In deciding this question in the negative, the court stated:

"Municipal property is property belonging to a municipality or a municipal corporation. Property thus owned, like property owned by the United States, the state, or a county, is, by the terms of the Constitution, exempt from taxation. If, therefore, an irrigation district is a municipal corporation, or a municipality, which means the same thing, its property is exempt. We think that question, however, is settled against the plaintiff by our previous decisions. . . .

"Our Constitution, articles XIII and XIV, respectively, divides corporations into 'Municipal Corporations' and 'Corporations other than Municipal.' The provisions of article XIII clearly

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show that they pertain only to cities and towns, or proper municipal corporations, and the provisions of article XIV 'include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or co-partnerships.' If heed be given to these constitutional definitions of corporations, then, clearly, irrigation districts are not municipal and neither is their property."

Thus, once again, the court refused to attribute to irrigation districts the status of true municipal corporations. But, not to be outdone by the Supreme Court, seven months after the Yuma Irrigation District decision was handed down, these and similar districts procured in the general election of November, 1940, the approval of the following constitutional amendment:

"Art. 13, Section 7. Irrigation
and other districts as political sub-
divisions

"Section 7. Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts, now or hereafter organized pursuant to law, shall be political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States; . . . "

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Thus it appeared that the battle between the legislature and the courts as to the status of irrigation districts had been resolved and that once and for all it was finally and definitely established that irrigation districts were municipal corporations. Then, along came the decision of Taylor v. Roosevelt Irr. Dist. (1950), 71 Ariz. 254, 226 P.2d. 154, and once again irrigation districts were relegated to a position inferior to true municipal corporations, the 1940 constitutional amendment notwithstanding. In that case, the court said:

"Article 13, Sec. 7, was added to the Constitution subsequent to the declaration by this court in State v. Yuma Irr. Dist., 55 Ariz. 178, 99 P.2d 704, that Sec. 75-455, A.C.A. 1939, was unconstitutional. That section placed irrigation districts on the same footing as a municipal corporation and thus granted them immunity from taxation. Thereafter, Article 13, Sec. 7, was added for the purpose of re-establishing this immunity.

"We are of the opinion that the primary functions of these irrigation districts have not been changed by the Constitutional Amendment, supra, and in the conduct of their ordinary business, they are not exercising governmental or political prerogatives as they are not operated for the direct benefit of the general public but only of those inhabitants of the district itself."

In the rehearing of this case reported in 72 Ariz. 160, 232 P.2d 107, the court refused to alter its position and further stated:

"As pointed out in our former opinion, the constitutional amendment, Section 7, Article 13, was adopted for the purpose of granting tax immunity to irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts. The true character of such districts was analyzed by this court in Day v. Buckeye Water, Etc. Dist., 1925, 28 Ariz. 466, 237 P. 638, 636, as follows: (quoting portions of Day v. Buckeye and Maricopa County Municipal Water Conservation Dist. No. 1 v. LaPrade already set out herein.)

"The actual operation and functioning of the district after the adoption of the constitutional amendment, supra, was in the same factual manner as at the time of the Day case. The adoption of the constitutional amendment in no sense altered the inherent characteristics of the district."

Thus the court held that its decisions prior to the 1940 Constitutional amendment relating to the status of irrigation

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districts were still valid and that the true character of such districts had not been changed by the constitutional amendment. Finally, the court said:

"Regardless of the fact that our cases may show some inconsistency in drawing a line of demarcation between what is governmental and what is proprietary, we experience no difficulty in determining that the appellee corporation is in essence a business corporation and that such attributes of sovereignty as have been conferred upon it are only incidental and were conferred for the purpose of better enabling it to function and accomplish the business and economic purposes for which it was organized."

So far as can be ascertained, the latest case to touch upon the subject is Local 266, Etc. v. Salt River Project Agr. Imp. & P. Dist. (1954) 78 Ariz. 30, 275 P.2d 393. That case deals with the character of agricultural improvement districts which are similar in nature to irrigation districts. At the beginning of the opinion on page 35 of the Arizona report the court states:

"Appellants contend that the foregoing amendment to the Arizona Constitution (i.e., Sec. 7, Art. 13) did nothing more than to grant the district immunity from taxation. We believe that a plain reading of the constitutional provisions unequivocally defines agricultural improvement districts of the state as political subdivisions of the state and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under the constitution or any law of the state or of the United States. . . Appellants' contention is incorrect."

A cursory reading of the opinion might give rise to the assumption that the court is abandoning its previous ruling regarding the status of irrigation and similar districts. However, in the latter part of the case, the court quotes with approval its prior utterances in the Day and Taylor cases and, in general, indicates that its prior pronouncements upon this subject are still valid. Moreover, we believe that a fair interpretation of the holding of the case relative to the status of irrigation and similar districts can be stated to be this: That while the court recognizes such districts as political subdivisions of the state and municipal corporations for some purposes, they are not strictly speaking municipal corporations in the sense that cities, towns and counties are municipal corporations and that they possess only such attributes of sovereignty as are necessary to carry out the primary purpose of their existence or, in other words, that they are quasi-municipal corporations vested with such governmental powers and possessing such attributes of municipalities as may be necessary for the execution of their purpose.

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With these conclusions in mind, we now turn to a consideration of the basic problem involved herein, i.e., whether irrigation districts may be placed upon the same plane as true municipal corporations such as counties, cities and towns with regard to the issuance of certificates of necessity and convenience authorizing the operation of public utilities within their boundaries. If such districts are in the same class as counties, cities, and towns, then the commission cannot license the operation of public utilities within their boundaries without their consent.

While Sec. 3, Art. 15 of the Constitution provides that incorporated cities and towns may be authorized by the legislature to exercise supervision over public service corporations doing business within their boundaries, the legislature has in fact never enacted any law delegating that power to them. The legislature has, however, provided in A.R.S. § 40-283 that counties, cities and towns shall have the right to grant to public service corporations a franchise to occupy their streets, alleys and roads. And it is not until a public service corporation has secured such a franchise that the power of the commission to license and supervise them becomes operative. Phoenix Ry. Co. v. Lount (1920), 21 Ariz. 289, 187 Pac. 933.

Thus, the extent of control which may be exercised over public service corporations by cities, towns and counties is that which exists by virtue of their right to license such public service corporations in the use of their streets, alleys and roads. And, if irrigation districts by virtue of their status as municipal corporations, have any control over public service corporations operated within their boundaries, the extent of such control is likewise limited.

The question then becomes: What control does an irrigation district exercise over streets, alleys and roads within its boundaries, if any? The construction, maintenance, and repair of public highways is a governmental function, which belongs primarily to, and is to be exercised by, the state and the state legislature. The power of the state to exercise this function is inherent, plenary, and part of its police powers. 40 C.J.S. Highways, Sec. 177. Whatever power an irrigation district has to grant a franchise for the use of highways within its boundaries must have been delegated to it by the state. It, in and of itself, has no such power and must act as an agency of the state regarding such matter. Phoenix Ry. Co. v. Lount, supra.

We have already seen that counties, cities and towns exercise their right to grant franchises to public utilities by virtue of a specific grant from the legislature. We now inquire whether irrigation districts have any such grant. So far as

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we can discover, the only authorization given to irrigation districts regarding this subject is contained in A.R.S. § 45-1578 (14). Therein it is provided:

"In order to accomplish the purposes of the district the board may:

14. * * * Erect and maintain transmission and pipe lines, culverts, roads and cross-ways and prevent obstructions thereon."

Obviously, this section cannot be construed to grant to irrigation districts control over the general system of public county and state highways within its boundaries. It does no more than to authorize the construction and maintenance of such private roads as are necessary in the conduct of its irrigation system. It has already been noted by the cases cited herein that, notwithstanding any statutory or constitutional pronouncements to the contrary, our court has consistently held that irrigation districts are in essence business corporations and possess only such attributes of sovereignty as are necessary to carry out their primary purpose, i.e., the irrigation of land. They have no express delegation from the legislature of this state to exercise any control over the public highways within their territories and we fail to find any basis from which such authority can be inferred. Therefore, failing to find any expressed or implied authority resting in irrigation districts to exercise control over the public highways within its boundaries such as is inherent in counties, cities and towns by expressed statutory provision, we find no basis to require that public service corporations desiring to establish business operations within the territorial limits of irrigation districts secure the permission of such districts prior to being certificated by the commission.

We therefore conclude that the Corporation Commission may license public service corporations within the boundaries of such districts without their consent and indeed over their protests, assuming that a case of necessity and convenience is proven to the satisfaction of the commission.

Very truly yours,

WADE CHURCH
The Attorney General

GEORGE W. OGLESBY
Assistant Attorney General

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