

Act expressly exempts "corporations subject to a tax under the provisions of article two of chapter thirteen of Title 54 of the Revised Statutes, or to a tax assessed on the basis of gross receipts, other than the tax levied by the veterans bonus tax law, or insurance premiums collected." (N.J.S.A. 54:10-3(a)). Since the New Jersey companies continue to be "subject" to article two of chapter thirteen of Title 54, they are expressly exempt from the Corporation Business Tax Act.

You are therefore advised that on the basis of the facts which you have stated, the New York Telephone Company is not subject to taxation by New Jersey; the surviving New Jersey corporations are taxable as domestic telephone companies under R.S. 54:13-11 et seq.; but since none of the latter corporations derives gross receipts from business done in New Jersey, they do not owe any tax to the State.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MURRY BROCHIN
Deputy Attorney General

JULY 26, 1960

HON. SALVATORE A. BONTEMPO
Commissioner
Department of Conservation
and Economic Development
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1960—No. 23

DEAR COMMISSIONER BONTEMPO:

We have been asked to interpret the terms "source" and "rated capacity of the equipment" as used in N.J.S.A. 58:4A-4. By Laws of 1947, c. 375, N.J.S.A. 58:4A-1, the Division of Water Policy and Supply in the Department of Conservation was empowered to delineate areas of the State in which the diversion of subsurface and percolating waters exceeded or threatened to exceed, or otherwise threatened or impaired the natural replenishment of such waters. This power is now exercised by the Water Policy and Supply Council in the Department of Conservation and Economic Development. Laws of 1948, c. 448, § 101, N.J.S.A. 13:1B-50. In a delineated area no person may withdraw from any subsurface or percolating source more than 100,000 gallons of water in any day without a permit from the Water Policy and Supply Council. But N.J.S.A. 58:4A-4 provides as follows:

"Any person, corporation, or agency of the public diverting or obtaining water at the time of the passage of this act, or at the time an area is delineated as provided in section one of this act, in excess of one hundred thousand gallons per day from subsurface or percolating water *sources*, shall have the privilege of continuing to take from the same *source*, the quantity of water which is the *rated capacity of the equipment* at that time used for

such water diversion without securing a permit as provided above." (Emphasis added.)

Particularly you ask whether "source" refers to the well in use or to all or a part of the aquifer from which its water is drawn and whether "rated capacity of the equipment" means the potential capacity of the well using the most advanced equipment or its capacity with the equipment actually in use at the time of the delineation of its area.

Laws of 1947, c. 375, N.J.S.A. 58:4A-1 et seq. introduced the doctrine of prior appropriation into New Jersey water law. Many western states have established that the first person to make use of surface waters may continue to withdraw a constant amount notwithstanding the needs of later putative appropriators. 93 C.J.S., *Waters*, § 167 (1956). These states have thus modified or rejected the common law that riparian owners have a right to insist upon a reasonable use of the water by upper riparian owners. *Ibid.* See *Borough of Westfield v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62 (App. Div. 1956). As noted in the *Westfield* case the doctrine of prior appropriation is founded on a theory that first in time makes first in right. Inasmuch as N.J.S.A. 58:4A-4 rests on a similar policy the decisions in prior appropriation states announcing the scope of the right of appropriation are useful in defining "source" within our statute. The pertinent holdings have been thus summarized:

"If the rights of others will not be materially injured or prejudiced, an appropriator may, without losing his priority, change the point of diversion for all, or part, of the water to which he is entitled, the means or method of diversion, the place of use or storage, the nature or purpose of the use, or the manner or means of use. This right of change is a property right; but it is a qualified one, for no such change can be made in point of diversion, means of diversion, place of use, nature or purpose of use, or means of use, if the change will be injurious or detrimental to the vested rights of others." 93 C.J.S., *Waters*, § 188 (1956).

See also *Pouchoulou v. Heath*, 137 Colo. 462, 326 P.2d 656 (Sup. Ct. 1958). Therefore the legislative policy underlying N.J.S.A. 58:4A-4 may be satisfied only by a construction of that section to authorize the drilling of a replacement well drawing on the same aquifer as the existing well, provided that the replacement well does not materially change the flow or distribution of the water in the aquifer. *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (Sup. Ct. 1949) supports this interpretation of the term "source." There the court held:

"* * * We do not believe the legislature intended to make the words 'water source' so inclusive that every person using surface water, percolating water, spring water or artesian water should all be charged with the costs and expenses of a commissioner because some part of their flow could be traced to a common source. We believe that the words were used in their generally accepted meaning and that 'source' was intended to be restricted to one origin such as a stream, a rise from the ground, a fountain, a spring, an artesian basin or some similar body; and that it was not the intention of the legislature to combine a river system with springs and artesian basins for purposes of distribution and administration. * * *" 204 P.2d at 825.

The statute does not define rated capacity of equipment. In *Polliak v. Smith*, 19 N.J. Super. 365 (Ch. Div. 1952), the court interpreted "equipment" as used in a will bequeathing property as follows:

"*Funk & Wagnalls' New Standard Dictionary of the English Language* (1937) defines 'equipment' as the act or process of equipping with all needful supplies for any special service; 'equip' is defined: to provide with all that is necessary for a successful undertaking. In *Eastern Penn. Power Co. v. State Bd., &c.*, 100 N.J.L. 255, 126 A. 216 (Sup. Ct. 1924), our former Supreme Court defined equipment as: 'Equipment means that which is needful, that which is necessary.'" 19 N.J. Super. at 369-70.

Within the above interpretation, the pump and well are equipment, both being an integral part of the undertaking, the withdrawal of water from the earth. The Legislature intended to protect wells in use at the capacity at which they could be used at the time of delineation. Thus if a well with a yield potential of 1,000,000 gallons daily had a pump capable of only 500,000 gallons daily at the time of delineation, the rated capacity of equipment is 500,000 gallons. In any similar example the smallest capacity of any part of the diversion equipment is its "rated capacity."

Very truly yours,

DAVID D. FURMAN
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By: MORTON I. GREENBERG
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July 29, 1960.

HONORABLE DWIGHT R. G. PALMER
Commissioner
State Highway Department
Trenton, New Jersey

FORMAL OPINION 1960—No. 24

DEAR COMMISSIONER:

You have raised the question as to whether municipalities along the route of the proposed East-West Freeway in Essex County may contribute to the cost of construction by contract with the Federal and State governments. The statutes specifically authorize such participation by municipalities as well as counties. R.S. 27:8-1 provides:

"The commissioner may apply to and contract with the United States government or any official thereof for aid in road work, and with the governing bodies of counties and other subdivisions of the state for doing such work with the aid of the state and federal governments. Such governing bodies may enter into such contracts and raise funds to meet their share of the cost in the manner provided by law for raising money for the construction, improvement and maintenance of roads."