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January 13, 2010

<b>DOCKET</b>	
<b>09-AFC-2</b>	
DATE	<u>JAN 13 2010</u>
RECD.	<u>JAN 13 2010</u>

Felicia Miller  
Project Manager  
Almond 2 Power Plant Project (09-AFC-2)  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Re: Turlock Irrigation District Almond 2 Power Plant (Docket 09-AFC-2)  
Legal Authorities Of Irrigation Districts Relative To Land Use

Dear Ms. Miller:

This letter provides a brief overview of certain powers and authorities an irrigation district (hereinafter “district”) possesses under California law relative to land use and the provision of electric and water services. A district’s statutory duties and obligations are vastly different from those of private, independent developers. California law provides for the structure, governance, and powers of an irrigation district in California (codified in the Water Code as the “Irrigation District Law”).<sup>1</sup> Other provisions of the Government Code apply to a district as local agency. A district is a state agency formed and existing for governmental purposes.<sup>2</sup> A district has a Board of Directors, which is accountable, by law, to the district’s ratepayers-owners. In addition, a district has a legal obligation in ensuring that its ratepayers-owners have safe, reliable, and economical electricity service. This entails in part, ensuring that its electrical system (transmission lines, substations, and power plants) are built in compliance with all applicable laws.

The state has a strong interest in promoting reliable water and electric services. Consequently, a district is a regulated public utility and has broad powers to ensure reliable water and electric service. California Water Code § 22225 provides that “each district has the power generally to perform all acts necessary to carry out fully the provisions of this division.” Moreover, a district’s determinations, especially those within its area of expertise (e.g. water or electric service) are entitled to a degree of discretion by other regulating authorities.<sup>3</sup> As one court noted

<sup>1</sup> Statutory provisions governing irrigation districts are codified at Division 11 of the California Water Code.

<sup>2</sup> Cal. Water Code. § 20570.

<sup>3</sup> Wilbur vs. Tia Juana River Irrigation District, 94 Cal. App 511 (1928).

“in the employment of its agents, the authorization to incur operating expenses, the levying of taxes and assessments, and the determination of the reasonableness of the value and character of materials furnished and labor performed, the board of directors act in a quasi-judicial capacity, and their discretion may not ordinarily be interfered with.”<sup>4</sup> Similarly, a district often has discretion in making compliance determinations with certain laws, ordinances, regulations, and standards (“LORS”). For example, districts are “state agencies,”<sup>5</sup> and as such, districts may serve as the CEQA lead agency for certain projects in their service territory.<sup>6</sup> A district commonly serves in this role and is often an expert in areas of environmental compliance and monitoring. A district’s authorities<sup>7</sup> also include (but are not limited to) (1) the power to construct, own, and operate facilities for the generation, transmission and distribution of electric power; and (2) exemptions from city and county building and zoning codes for certain facilities.

### Discussion

#### I. A District May Cite, Construct, Own And Operate Electric Generation And Transmission Facilities

For electric service, a district may “do all necessary and proper acts for the construction and operation of its electric power works,”<sup>8</sup> including acquiring “any property or interest in property”<sup>9</sup> necessary to carry out district purposes.<sup>10</sup> A district also has the authority to “provide for the acquisition, operation, leasing and control of plants for the generation, transmission, and distribution...of electric power.”<sup>11</sup> Thus, from an operational standpoint, a district has broad authority to acquire and maintain property in order to control and ensure reliable electric service

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<sup>4</sup> Wilbur vs. Tia Juana River Irrigation District, 271 P. 514 (1928).

<sup>5</sup> Cal. Water Code § 20570; Ca. Govt. Code § 53090; See also Attorney General Opinion, finding that an irrigation district “is clearly an agency of the state of for the local performance of governmental or proprietary function within limited boundaries.” (78 Ops. Cal. Atty Gen. 31).

<sup>6</sup> Pub. Res. Code § 21081.1.

<sup>7</sup> A district’s powers are in part defined by statute. Ca. Water Code § 22075 – 22235 list the powers and purposes of a district.

<sup>8</sup> Cal. Water Code § 22118. Section 20530 of the Water Code includes within the meaning of “works” are “dams, reservoirs, wells, conduits, pumps, power houses, power generating equipment, power lines, and their appurtenances.”

<sup>9</sup> Cal. Water Code § 20529. “Property” includes “all real and personal property, including water, water rights, works, franchises, concessions and rights.” As noted above in footnote 4, power lines are included within the definition of works.

<sup>10</sup> Cal. Water Code § 22425, 22118.

<sup>11</sup> Cal. Water Code § 22115.

for its territory. A district may also set reasonable rates to pay for such acquisitions.<sup>12</sup> The decision to acquire new property and the evaluation of rates require significant expertise, and a district often gains significant, unique expertise in electric service, land use, and water services. As discussed above, districts also regularly serve as the CEQA lead agency and/or a compliance monitor for the projects they own and operate. Consequently, a district will have expertise relative to the utility services it provides and also have regulatory compliance expertise through its role as a state agency.

## **II. California Government Code Provides That Certain District Facilities Are Exempt From City And County Building And Zoning Ordinances**

The determination of compliance with a particular LORS is often case specific, and local agencies must generally comply with building and zoning ordinances. However, there are certain situations that justify exemption from those ordinances. These exemptions implicitly recognize that there is a strong state interest in the efficient development and siting of water and energy infrastructure.<sup>13</sup> As one court noted in *City of Lafayette vs. East Bay Municipal Utilities District*, “when read as a statutory scheme, the obvious intent of the Legislature [in enacting Government Code Section 53091] was to strike a balance between the value of local zoning control by cities and counties and the state interest in efficient storage and transmission of water.”<sup>14</sup> The court went on to conclude that facilities that are “connected with” and are in fact “integral to the proper operation” of particular water storage and transmission functions of a water district are subject to the exemptions listed above.<sup>15</sup> This rationale can reasonably be said to apply equally to energy facilities, given the explicit reference to energy facilities in the same code sections the court referenced in the aforementioned quote. Those code sections are detailed here. Under the provisions of Government Code Section 53091(d), local agencies<sup>16</sup> engaged in the generation and transmission of electricity, are exempt from local building ordinances.

Building ordinances of a county or a city shall not apply to the local location or construction of facilities for the production, generation, storage, treatment, or transmission of water, wastewater, or electrical energy by a local government. Similarly, Government Code Section 53091(e) goes

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<sup>12</sup> Ca. Water Code § 22280.

<sup>13</sup> See 78 Cal. Attorney General Opinion 31, at p. 35, citing *City of Santa Clara v. Santa Clara Unified School Dist*, 22 Cal. App. 3d 1, 8 (1989) and *City of Lafayette vs. East Bay Municipal Utilities District*, 16 Cal. App. 4<sup>th</sup> 1005 (1993).

<sup>14</sup> See *City of Lafayette*, supra, 1014.

<sup>15</sup> Id. at 1015.

<sup>16</sup> California Water Code Section 20570 states that districts are state agencies. According to the Attorney General Opinion referenced above and the case law cited by the Opinion (78 Cal. Attorney General Opinion 31, at p. 35, at p. 33), districts are also considered local agencies. Thus, for purposes of the application of Government Code Section 53091, the distinction between local and state agency is immaterial.

on to exempt districts from compliance with zoning ordinances for certain facilities. That section reads:

Zoning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, treatment, or transmission of water, or for the production or generation of electrical energy, facilities that are subject to Section 12808.5 of the Public Utilities Code, or electrical substations in an electrical transmission system that receives electricity at less than 100,000 volts. Zoning ordinances of a county or city shall apply to the location or construction of facilities for the storage or transmission of electrical energy by a local agency, if the zoning ordinances make provision for those facilities.

If a project falls into any of the categories listed above, a district is not required to comply with city or county zoning ordinances. In sum, given the strong public need for efficient production of energy and water, a district is not required to comply with city and county building and zoning ordinances for facilities covered in Govt. Code Sec. 53091(d) and (e). As noted in the *Lafayette* decision, these exemptions apply to the facilities that are connected with and integral to the proper operation of water and energy generation and transmission.

### **Conclusion**

An irrigation district is considered a state agency, and as such, enjoys broad discretion in how it carries out its operations. This is appropriate since a district can construct, own, and operate facilities for the generation, transmission and distribution of electric power, and will often be an expert in the provision of these services. A district will also gain similar expertise in ensuring its own regulatory compliance. While districts are subject to many of the same regulatory requirements as other agencies, there are certain exemptions. A district must provide reliable water and energy services. This is a strong state interest. A district is therefore exempt from compliance with city and county building and zoning ordinances for facilities that are connected and integral to the provision of water and energy services.

Sincerely,



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Jeffery D. Harris  
Brian S. Biering

Attorneys for Turlock Irrigation District

STATE OF CALIFORNIA


Energy Resources Conservation  
and Development Commission

In the Matter of: )  
 ) Docket No. 09-AFC-2  
Application for Certification for the TID )  
Almond 2 Power Plant )  
 )  
 )  
\_\_\_\_\_ )

**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on January 13, 2010 I served copies of the attached *Letter to Felicia Miller regarding Irrigation District Legal Authorities Regarding Land Use* by email and U.S. Mail to each party on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Karen A. Mitchell



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – [WWW.ENERGY.CA.GOV](http://WWW.ENERGY.CA.GOV)

**APPLICATION FOR CERTIFICATION  
FOR THE TID ALMOND 2  
POWER PLANT PROJECT**

**Docket No. 09-AFC-2**

**PROOF OF SERVICE  
(Revised 12/10/09)**

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