

**LOCAL AGENCY FORMATION COMMISSION  
COUNTY OF SAN BERNARDINO**

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**DATE: JUNE 8, 2009**  
**FROM: KATHLEEN ROLLINGS-McDONALD, Executive Officer**  
**TO: LOCAL AGENCY FORMATION COMMISSION**

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**SUBJECT: AGENDA ITEM #10 – LAFCO 3008A – ACTIVATION OF WATER POWERS FOR YERMO COMMUNITY SERVICES DISTRICT**

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**INITIATED BY:**

**Yermo Community Services District**

**RECOMMENDATION:**

Staff recommends that the Commission make the following determinations:

1. Certify that LAFCO 3008A is statutorily exempt from environmental review and direct the Clerk to file the Notice of Exemption within five days;
2. Approve the request to activate the water function for the Yermo Community Services District which amend the “Rules and Regulations Affecting Special Districts” to indicate the following as authorized functions and services for the Yermo Community Services District:

	<b><u>FUNCTION</u></b>	<b><u>SERVICES</u></b>
<b>Yermo Community</b>	Fire Protection	Structural, watershed, suppression, prevention
	Streetlighting	Streetlighting
	Park and Recreation	Local park development, operation, maintenance
	Water	Supply water for any beneficial use as outlined in Municipal Water District Law (commencing with Section 71000) of the Water Code

3. Adopt LAFCO Resolution No. 3060 reflecting the Commission's findings and determinations and providing for the conduct of protest proceedings for the activation of water power.

### **INTRODUCTION:**

When Independent Special Districts were seated on the San Bernardino LAFCO in 1976, the Commission was required by law to adopt "Rules and Regulations Affecting Special Districts". The Rules and Regulations included the establishment of a listing which outlined the "active" and "latent" powers for each of the special districts under the Commission's purview. Active powers were those defined as being actually provided by the special district at that time; latent power were those powers authorized the district by its respective principal act but which were not actively provided at the time. The Rules and Regulations also outlined the process to be undertaken thereafter to expand the "active" powers of an agency.

In December 2005, LAFCO staff notified all Community Services Districts of the rewrite of the Community Service District principal act, which included the requirement that all functions not at the time currently provided would become latent powers. The response from the Yermo Community Services District (hereafter YCSD or CSD) was that it was not actively providing water service; therefore, the Commission removed water from the listing of active functions and services of the District at its January 2006 hearing.

At the close of 2006, representatives of the CSD contacted LAFCO staff to discuss the potential for re-activating its water powers due to issues related to the operation of the Yermo Water Company. This discussion was on and off for more than two years. During this time, LAFCO staff and the President of the Board of Directors of the CSD discussed the requirements for submission of the application and ultimately in April 2009, the application was submitted for Commission consideration.

Attachment #1 to this report provides a map of the existing Yermo CSD which includes the outline of the anticipated water service area. Attachment #2 provides the CSD's application for activation of water powers, including its response to the plan for providing the service requirements.

### **HISTORY:**

In 1982, the Yermo CSD initiated an application to LAFCO requesting the expansion of its range of authorized functions and services to include its latent power for retail water service (LAFCO 2189). It was acknowledged in the staff report (copy included as Attachment #3) that while the District was formed with the full range of authorized functions and services it was required to seek Commission authorization to engage in water delivery activities. The purpose of the application, as defined by the CSD Board of Directors, was to acquire the existing private water company which was "deteriorated, under-sized and without adequate water supply or storage". The CSD Board at the time indicated that the ownership of the system was uncertain and they wished the opportunity to acquire and operate the water enterprise through formation of an improvement zone of the District. The Commission approved the expansion of powers noting that the active participation of the CSD in water issues would benefit the community.

As noted above, the rewrite of CSD law in 2005 required the removal of the District's water powers; that action of the Commission took place in January 2006. In August 2006, the Yermo Water Company experienced water outages and the requirement for boiled water notices through the California Department of Public Health. This occurrence began what would become, at long last, a full investigation of the Yermo Water Company by the California Public Utilities Commission (hereafter PUC). As noted above, the original CSD request for activation of its water powers was an attempt to acquire the Yermo Water Company for failing to service its customers adequately and in 2006, the same issues were continuing to confront the recipients of domestic water service from the Yermo Water Company. On April 6, 2009, the PUC rendered its decision directing its staff to file for receivership of the Yermo Water Company with the San Bernardino County Superior Court. The effect of this ruling is to remove the operations of the Yermo Water Company from its owner, Mr. Don Walker of Florida, and have the Court appoint a receiver to operate the system and secure a buyer for the operation. This culminates a 20+ year review by the PUC of the operations of this water company.

As the PUC began its investigation, representatives from Yermo CSD contacted LAFCO staff regarding the question of reactivating its water functions. Over a period of months, the administration of the District was notified of the requirements to expand their range of services and the District expressed its desire to have this activation reviewed as a part of the District's Municipal Service Review. Ultimately, at the July 2008 hearing the Commission authorized a reduced deposit for direct costs for consideration of this proposal and required the District to submit the required forms and documentation that would allow LAFCO staff to conduct a review of the proposal.

As noted at the outset of this report, over a period of many months and several stops and starts in the process, the CSD in a letter dated January 21, 2009, officially notified the Commission that it was applying for the reactivation of its water powers and in April 2009 the materials were submitted for review.

### **DISCUSSION:**

The Yermo CSD has submitted an application requesting activation of its latent water powers which includes the completion of the necessary forms and the provision of a plan outlining the anticipated delivery of the service. The Municipal Service Review conducted for this agency (LAFCO 3008) has provided a detailed outline of the problems encountered in the operation of the Yermo Water Company, as well as its current water usage and financial concerns.

A concern to LAFCO staff is that the materials submitted do not provide for an identification of the method by which the CSD would become the owner/operator of the Yermo Water Company. This circumstance is due to the uncertainty surrounding the actions of the Courts in the receivership and the determinations of the value of the system. While the details of the receivership (such as duration, cost, etc) and the cost for acquisition are unknown at this time, they do not preclude the discussion of a regional public agency acquiring this system to operate it for the benefit of the community. The public agencies that exist that could provide this service are County Service Area 70 through an improvement zone, Yermo or Daggett CSDs. In order to be considered by the Courts as a viable alternative for acquiring the system as well as the ability to seek financing to acquire the system, the Commission would need to

approve the activation of this power for Yermo CSD so that it can legitimately expend its resources on this service.

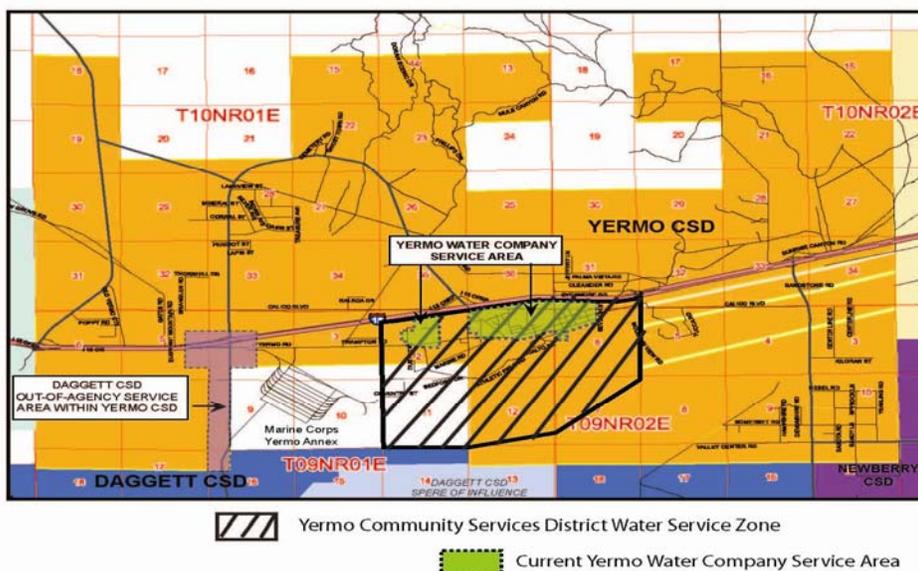
The CSD's application includes the submission of a plan to provide the service which describes the delivery of this service through a contractual relationship. The materials identify that the CSD contacted the County Special Districts Department and a private enterprise, High Desert Underground, for quotes on the cost of providing retail water service (included in the application materials – Attachment #2). LAFCO staff circulated the application for review and comment to County Departments and to the State departments of the PUC and the California Department of Public Health, Drinking Water and Environmental Management Section.

To date, no written expression of comment or concern has been received related to the activation of this function. Staff met with representatives of the Department of Public Health to review the application materials. Representatives of the Department noted that the application to receive the permit to operate this system, should Yermo CSD be successful in acquiring it, would require a far more extensive technical, managerial and financial report than that provided in the application. A sample of the information that would be required in order to receive a permit to operate the system is included as Attachment #5.

**Boundaries:**

As a part of its application, the CSD has provided a resolution forming a service area for the delivery of water service, as requested by LAFCO staff. LAFCO staff's concern related to the fact that the activation of a function and service can not be limited to a specific portion of the district; it is available throughout the jurisdiction. LAFCO staff's request of the District was to clearly define the area that would be anticipated to be served and therefore obligated to secure the funds to purchase the water system. The District's resolution defined that service area as shown below:

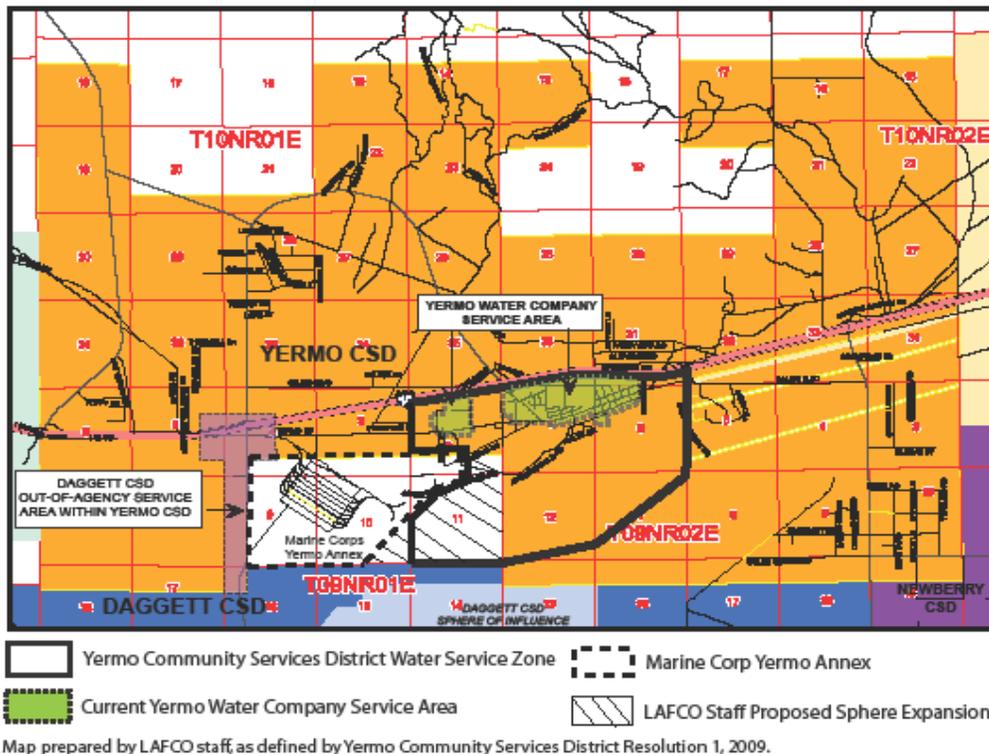
LAFCO 3008A – Activation of Water Powers for Yermo Community Services District



Map prepared by LAFCO staff, as defined by Yermo Community Services District Resolution 1, 2009.

As can be seen from this map, the service area includes territory outside the boundaries and existing sphere of influence of the District. It is LAFCO staff's recommendation that the District modify the boundary prior to recording it and submitting it to the State Board of Equalization to include only the territory within the CSD and its modified sphere of influence, if approved by the Commission under LAFCO 3008. Such an action would require consultation with and approval by the County of San Bernardino for the lands within the sphere of influence territory. Should this recommendation be accepted, the service area would include the following territory:

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The significance of this boundary is that, should the financial arrangements be secured to acquire the Yermo Water Company system through the receivership, it is this area that would be obligated to repay whatever loans may be necessary or could be assessed for payment of charges, if any.

The activation of water functions and services will not alter the existing contractual relationship of the Daggett CSD providing water services within the Yermo District. The map identifies the location of this existing system in the western portion of the District generally at the intersection of the I-15 and Yermo-Calico Road.

**Financial and Operational:**

The materials provided in the application identify that the water powers would be used to acquire the existing Yermo Water Company system. The Municipal Service Review materials

outline the history of problems associated with the private operation of the Company. The financial and operational materials submitted outline a process where the Yermo CSD anticipates acquiring the system during receivership through what are anticipated to be either grants or low-interest loans, and then operating the system by contract with the private firm, High Desert Underground. The choice of High Desert Underground is anticipated since its quote is within the existing financing capability of the ratepayers of the water company.

The spreadsheet provided as a part of the application materials from High Desert Underground identifies that it will provide for the service under the existing funding mechanisms. Staff's only response in the review of the budget as presented by High Desert Underground is that it appears that the cost of \$2,500 per month for general management appears on the low side. Of importance, the PUC is currently processing a rate increase for the Yermo Water Company since it has been severely under funded in the past and has no reserves for capital improvements. If this rate increase is authorized, it would allow for the development of reserves to upgrade the system and pay for adequate management controls.

In addition, the operational information outlines no cost for legal counsel services by the District in its quest for acquiring the system. Due to the highly technical legal nature of the receivership process and acquisition of the private system, this deficiency is of concern to LAFCO staff. In response to this question, the President of the Board of Directors has indicated that due to the limited financial resources of the District, they do not wish to expend its revenues without some assurance of success and may seek pro bono legal assistance during the initial process.

While the Commission's authorization to activate water powers for the Yermo CSD anticipates the delivery of domestic water, the actual provision of this service by the District through the acquisition of the Yermo Water Company will be determined by a judge through the receivership process. The CSD will need to show its technical, financial and managerial ability to provide this service to the ratepayers of the Yermo Water Company and that will mean the preparation of budgets that provide for an understanding of revenue carryover positions and the intricacies of a collection system – a level of sophistication not currently required of the District – as well as the technical operation and management of a public utility.

### **Environmental Considerations:**

The Commission is the lead agency for review of the potential environmental consequences of this activation of water functions and services. In conducting his evaluation, the Commission's Environmental Consultant, Tom Dodson and Associates, has determined that the activation of water powers is statutorily exempt from environmental review. The basis for this determination is that LAFCO 3008A does not have the potential to cause a significant effect on the environment, and therefore does not constitute a project as defined by CEQA. Mr. Dodson's response is included as Attachment #6.

### **Protest Provisions:**

Staff has identified throughout this discussion that legislative changes effective January 1, 2009 have affected the processing of this proposal, such as requiring a property tax transfer resolution. In addition, it also now requires a protest process for activation or removal (identified in as a "divestiture") of a function or service from a special district. Approval by the

Commission of the Yermo CSD's request for activation of water powers will require a protest hearing, pursuant to Government Code Section 57075, which will include individual notification and publication of the Notice of Protest Hearing. Therefore, the process will now provide that following the mandatory reconsideration period of 30 days, a 21 day protest proceeding will be initiated. Final approval will depend on the level of protest received by LAFCO from within the District's boundaries, under the standard protest provisions outlined as follows:

- Less than 25% of registered voters or less than 25% of landowners representing 25% of the land value (no improvements) within the district protesting, the activation will be approved;
- 25% to 50% of the registered voters protesting or 25% or greater of the landowners representing at least 25% of the land value protesting will require an election of the registered voters; or,
- More than 50% of the registered voters protesting will require termination of the application.

Following the conduct of the protest hearing, a final resolution will be prepared identifying the approval, election requirement or termination of the proposal. As with all protest proceedings, this is a non-discretionary action, the process simply solicits and evaluates protest to the change in the functions and services of the District. Dependent upon the protest determination either a Certificate of Completion or a Certificate of Termination will be issued for the activation.

#### **DETERMINATIONS:**

1. Notice of this hearing has been provided through publication of the original hearing notice in the *Desert Dispatch*, a newspaper of general circulation in the area as required by law.
2. The proposal does not conflict with the adopted County General Plan adopted for the area.
3. As the CEQA lead agency, the Commission's Environmental Consultant, Tom Dodson and Associates, has reviewed LAFCO 3008A. Mr. Dodson has indicated that the review of the proposal is statutorily exempt from the California Environmental Quality Act (CEQA). This recommendation is based on the finding that the Commission's approval of the action has no potential to cause any adverse effect on the environment; and therefore, the proposal is exempt from the requirements of CEQA, as outlined in the State CEQA Guidelines, Section 15061 (b) (3). A copy of Mr. Dodson's report is included for the Commission's review as Attachment #6.
4. Pursuant to changes in the definition of actions considered to be a "change of organization" as defined by Government Code Section 56021, the activation of latent powers now requires the adoption of a property tax transfer resolution under the provision of Revenue and Taxation Code Section 99. On June 9, 2009, the County Board of Supervisors is scheduled to adopt a no property tax transfer resolution on behalf of the Yermo CSD. This will allow the Commission to take action on this item.

5. The area of the Yermo Community Services District is currently served by the following local agencies:

County of San Bernardino  
Yermo Community Services District  
Mojave Water Agency  
County Service Areas 40 and 70  
Mojave Desert Resource Conservation District

None of the agencies are affected by this application.

6. The Plan for Service submitted by the District as a part of the application has been reviewed and compared with the standards established by the Commission and the factors contained within Government Code Section 56668. The Commission finds that such Plan conforms to those adopted standards and requirements. LAFCO 3008A is consistent with Commission policies and the directives of State law indicating a preference for a multi-purpose entity to provide service to communities in order to provide a more accountable form of government.
7. LAFCO 3008A is consistent with the Commission's policies and directives of State law indicating a preference for a multi-purpose entity to provide service to communities to allow for a more accountable form of government.
8. All notices required by law for this hearing have been provided. To date, no protest to this consideration has been received. This determination will be updated at the Commission hearing.

**CONCLUSION:**

Regardless of the actions taken related to the Municipal Service Reviews for the Yermo, Daggett, Harvard and Newberry Springs communities, LAFCO staff supports the activation of water powers for the Yermo CSD. Approval of LAFCO 3008A will provide the Yermo CSD the ability to participate in acquisition proceedings to acquire the Yermo Water Company and be responsible for the operation and maintenance of the system. The successful acquisition of the system would allow the local electorate to have a say in the management of the water operations through their elected board of directors. Local control of this fundamental service is long overdue for the community. For all these reasons, staff supports the activation of the latent water powers of the Yermo CSD. As noted throughout this report, however, the final determination on the transfer of ownership of the Yermo Water Company rests with a judge in San Bernardino Superior Court, not the Commission.

/krm

Attachments:

1. Map of the Area Proposed for Water Service by the Yermo Community Services District
2. Yermo Community Services District Application for Activation of Latent Water Powers and Municipal Water District Law Code Section 71610 defining Water Services
3. Staff Report for LAFCO 2189 and Resolution of Approval

4. Public Utilities Commission Decision on Yermo Water Company Issued May 7, 2009 and Pending Rate Increase for Yermo Water Company
5. California Department of Public Health Application for Small Community Water System
6. Letter from Tom Dodson, Tom Dodson and Associates, Environmental Consultant for LAFCO
7. Draft Resolution No. 3060