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January 20, 2011

Larry Winn, Chair
Soil and Water Conservation Commission
PO Box 30005
Las Cruces, NM 88003-8005

Re: Opinion Request - Soil and Water Conservation District Authority to Impose Mill Levy on High Lonesome Mesa Wind Project

Dear Mr. Winn:

You requested our opinion regarding the effect of industrial revenue bonds issued by Torrance County to finance the High Lonesome Mesa Wind Project ("HLMWP") on the Claunch-Pinto Soil and Water Conservation District ("CPSWCD"). Specifically, you asked whether a county government "has the authority to enter into agreements which will affect the taxing authority, and thereby reduce the income, of other local public bodies without the consent of the local public bodies." From the facts presented in your request, we believe the question is more appropriately framed as follows: Does a county government have the ability to enter into an agreement under the County Industrial Revenue Bond Act that will affect the taxing authority of a soil and water conservation district without the consent of the district?

As discussed below, based on our examination of the relevant New Mexico constitutional, statutory and case law authorities and on the information available to us at this time, we conclude that a county government does not need to inform or obtain consent from a soil and water conservation district when it issues industrial revenue bonds under the County Industrial Revenue Bond Act, NMSA 1978, Sections 4-59-1 to -16 (1975, as amended through 2003) ("County IRB Act"), even when the bond issue has a negative impact on the district's tax base.

The HLMWP, located in Torrance County, uses wind turbines to generate electricity. Torrance County approved a \$190 million industrial revenue bond issue to finance the project. According to news reports, the project will not be subject to property taxes for thirty years. See Michael Hartranft, N.M. Attracting Wind Farms; Newest One with 40-Story Turbines, Albuquerque Journal, Oct. 25, 2009. In exchange, the project developer agreed to make payments in lieu of taxes to Torrance County and the Estancia School District. *Id.*

The CPSWCD has imposed a mill levy on real property within its boundaries, as authorized by the Soil and Water Conservation District Act. See NMSA 1978, § 73-20-46 (2009). The assessment is billed and collected in the same manner as, and is covered by the same “conditions, penalties and rates of interest” that apply to, county ad valorem taxes. Id. § 73-20-46(D), (E). Because the property and improvements of the HLMWP are no longer subject to assessment and taxation, the CPSWCD will not receive the proceeds of its mill levy on that property for the 30-year period of the IRB arrangement. Although CPSWCD was negatively affected by the financing transaction, it was not consulted about or involved in the negotiations between Torrance County and the developers for the HLMWP.

The County IRB Act permits a county “to acquire, whether by construction, purchase, gift or lease, one or more projects” and “to issue revenue bonds for the purpose of defraying the cost of acquiring ... any project...” NMSA 1978, § 4-59-4(A), (C). A “project” for purposes of the Act, is “any land and building or other improvements thereon ... and all real and personal properties deemed necessary in connection therewith, whether or not now in existence” that is suitable for various purposes, including electric generation facilities. Id. § 4-59-2(F)(2)(b). The maximum term for payment of the bonds is thirty years from the date of the bonds. See NMSA 1978, § 4-59-5(B). Typically, a county will convey a project’s property back to the developer when the bonds are paid at the end of the term.

Property of a county is exempt from taxation under the New Mexico Constitution. See N.M. Const. Art. VIII, § 3. When a county acquires a project under the County IRB Act, the project’s property is covered by the constitutional tax exemption. See Village of Deming v. Hosdreg Co., 62 N.M. 18, 33-35, 303 P.2d 920, 930-31 (1956) (statute authorizing municipal industrial revenue bonds did not violate the state constitution’s requirement for “equal and uniform” taxes because a project financed with industrial revenue bonds is owned by the municipality and exempt from ad valorem taxation under Art. VIII, § 3). Accord Kennecott Copper Corp. v. Town of Hurley, 84 N.M. 743, 746, 507 P.2d 1074, 1077 (1973).¹ The exemption applies for the period the county owns the property, which, as noted above, usually is coextensive with the term of the bonds.

As was the case here, the property tax exemption resulting when a county acquires a project under the County IRB Act directly affects the taxing authority of local government entities in which the project is located. Nevertheless, the County IRB Act expressly provides

¹ In Village of Deming and Kennecott Copper Corp., the New Mexico Supreme Court upheld statutes similar to the County IRB Act in the face of a variety of constitutional challenges, including alleged violations of the state constitution’s provisions governing state and local government debt, donations of public money and taxation. See also Seward v. Bowers, 37 N.M. 385, 24 P.2d 253 (1933).

No notice, consent or approval by any commission or public officer shall be required as a prerequisite to the sale or issuance of any bonds or the making of a mortgage under the authority of the County Industrial Revenue Bond Act, except as provided in that act.

NMSA 1978, § 4-59-14. The Act provides that a county, “[p]rior to adopting an ordinance issuing county industrial revenue bonds, ... shall give notice to the county assessor and the largest municipality located within the county...” Id. § 4-59-4.1(A). Again, however, “there is no approval required from the municipality or the county assessor and they do not have veto over the proposed county industrial revenue bond issuance.” Id. § 4-59-4.1(B).

The only provision of the County IRB Act requiring the prior approval of an affected local government entity applies to a county’s acquisition of electrical generation facilities, such as the HLMWP. Under Section 4-59-4(A)(2), the local school board of a school district in which the project is located must approve the acquisition and be included in negotiations “to determine the amount of an annual in-lieu tax payment to be made to the school district by the person proposing the project, for the period that the county owns and leases the project...” Based on the information available to us, it appears that Torrance County properly obtained approval from the Estancia School District for the County’s acquisition of the HLMWP and that the parties to the transaction provided for the required in-lieu tax payment to the District.

In light of the above discussion, it appears that a county that acquires a project located in a soil and water conservation district and issues industrial revenue bonds under the County IRB Act has no statutory obligation to obtain the prior consent of the soil and water conservation district, even if the project will have an adverse effect on the district’s mill levy revenues.

You have requested a formal opinion on the matter discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



JUSTIN R. WOOLF
Assistant Attorney General