

April 2, 2020

MEMBER AGENCIES

Carlsbad
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain
Municipal Water District

Otay Water District

Padre Dam
Municipal Water District

Camp Pendleton
Marine Corps Base

Rainbow
Municipal Water District

Ramona
Municipal Water District

Rincon del Diablo
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center
Municipal Water District

Vista Irrigation District

Yuima
Municipal Water District

OTHER
REPRESENTATIVE

County of San Diego

VIA E-MAIL AND U.S. MAIL

Keene Simonds
Executive Officer
San Diego County Local Agency Formation Commission
9335 Hazard Way, Suite 200
San Diego, CA 92123
E-Mail: Keene.Simonds@sdcounty.ca.gov

Re: Request/Application for Determination that San Diego County Water Authority Is Not a District for Purposes of Part 4 of the CKH Act for LAFCO File RO20-05

Dear Mr. Simonds:

The San Diego County Water Authority (the “Water Authority”) received a notice dated March 25, 2020, from the San Diego County Local Agency Formation Commission (“SD LAFCO”) regarding the filing of the proposal (“Proposal”) by Fallbrook Public Utilities District (“Fallbrook”) for a reorganization that would affect the Water Authority and its member agencies. The notice informed the Water Authority that it had until April 6, 2020 to file an application under “Government Code sections 56127 and 56128 for a determination that the Authority is a not a district for purposes of Part 4 or Part 5 of CKH for the above-referenced proposal.”

This letter constitutes: (1) an application to SD LAFCO by the Water Authority for a determination that, as to the Proposal, the Water Authority is not a district per Government Code sections 56127, 56128, and 56036.6 as to *Part 4 only* of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“CKH Act”); (2) a request by the Water Authority that if for any reason SD LAFCO were to consider approving the Proposal, that as a condition of approval SD LAFCO should require a majority vote of the Water Authority service area as to the detachment sought by Fallbrook; and (3) a request by the Water Authority that SD LAFCO stay the Proposal from moving forward during the current COVID-19 emergency, and an objection to further proceedings during this period of emergency. The latter being the most urgent issue, it is addressed first.

COVID-19 Emergency, Objection And Request For Stay

The United States, the State of California, the County of San Diego, and the City of San Diego are all under emergency orders in connection with the COVID-19 epidemic, and most of our region’s residents are heeding “shelter in place” instructions from their governmental authorities. We are all in the midst of an unprecedented disruption of our societal norms, including severe work disruptions.

Mr. Keene Simonds

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The Water Authority Board has, like many other public agencies, declared emergency status. As a result, the Water Authority has significantly limited its operations and has moved to a largely remote workforce. We understand that many other agencies have done the same.

We are very surprised and disappointed that Fallbrook chose to file its Proposal in the midst of this crisis. Indeed, it is remarkable that the Proposal papers make no mention of the existential emergency we all face, or suggest any delays in the process. Rather, the Proposal simply presents advocacy and argument without even mentioning the unprecedented circumstances we find ourselves in as a result of the COVID-19 virus precautions being taken across the country.

The Water Authority and its other member agencies are focused at this time, as they should be, on maintaining the continuity of needed water service for our region. The Water Authority does not believe that any processing of the Proposal should go forward at this time, and we object to any further proceedings on the matter at SD LAFCO as prejudicial to the rights of the Water Authority, our other member agencies, and the public we all serve to fairly and properly address the Proposal. Our staff and those at agencies which would want to participate are swamped with emergency-related matters, consultants are shut down or limited in scope, coordination with other agencies is necessarily curtailed, and access to key documents is impaired. *The Water Authority respectfully requests that SD LAFCO, as has been done by the courts and many other public agencies, stay any further processing of the Proposal until the COVID-19 emergency subsides.* When that occurs, SD LAFCO could then formally notify the parties that the stay is lifted and normal processing will resume. We hereby agree that SD LAFCO's processing of the Water Authority's application presented next in this letter may also be stayed along with the Proposal.

Application for Exemption from Part 4 of the CKH Act

The Water Authority hereby files its request/application for determination by SD LAFCO that, as to the Proposal, the Water Authority is not a district or special district *for purposes of only Part 4 of the CKH Act* pursuant to Sections 56127, 56128 and 56036.6. The Water Authority hereby requests that you present this request/application to the Commission, but subject to the stay request stated above. The Water Authority Board of Directors has authorized this application per its signed Resolution dated November 21, 2019 (the "Resolution"), a copy of which is attached, along with the Water Authority Board Memo for that item.

Please take note that the Water Authority does *not* seek exemption from Part 5 of the CKH Act, and is allowed to limit its application in this manner. *See* Section 56128 ("or"); Section 56036.6(a) ("or"); Section 56036.6(b) (reference to Part 4); and Section 56128 ("or"). Also, please note that our application applies only to this Proposal (there is a similar application being filed by the Water Authority as to Rainbow Municipal Water District), and is not a blanket request for a perpetual determination as to all possible future matters.

As stated in the Resolution, the Water Authority is a county water authority and is not engaged in: (a) the distribution and sale for any purpose, other than for the purpose of resale, of water or of gas, or electricity for light, heat, or power; (b) furnishing sanitary sewer service or garbage and refuse collection service to the ultimate users thereof; (c) providing fire or police protection; or (d) the acquisition, maintenance, lighting or operation of streets and highways, street and highway improvements or park and recreation facilities,

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except as an incident to the exercise of other lawful power of the Water Authority. In the attached Resolution, the Water Authority Board of Directors approved the statement of the above-listed facts to submit to SD LAFCO. Thus, the Water Authority meets the statutory requirements for exemption “for purposes of Part 4 (commencing with Section 57000) or Part 5 (commencing with Section 57300).” (Cal. Gov’t Code section 56127.)

As you know, there was a prior Water Authority exemption determined by SD LAFCO. On November 11, 1976, in accordance with the District Reorganization Act of 1965 (“DRA”), the Water Authority submitted to SD LAFCO an application for exemption from LAFCO’s authority (the “1976 Application”). At the time under the extant law, the procedure for exemption from SD LAFCO authority was governed by Sections 56105, 56106 and 56039 of the California Government Code, all of which have since been repealed and replaced. It is important to note that under the prior law, an agency such as the Water Authority could seek an entire exemption from SD LAFCO’s jurisdiction, not the very limited exemption as to Parts 4 or 5 of the CKH Act which is present in the law today. Thus, when the 1976 Application was filed, the Water Authority was allowed to remove itself entirely from SD LAFCO review, but that is no longer the case under current law. This makes the 1976 Application (and subsequent determination) of no effect in the current proceedings, because the law has substantively changed. That is one reason why the Water Authority submits this new application under the applicable law that exists today, the CKH Act. Additionally, under the current law, an application or request for determination that an agency is not a district must now be made on an application-by-application basis (see Gov. Code Sections 56127 and 56128). Therefore, the Water Authority’s application only covers the Proposal application (and, via a separate application by the Water Authority, the sister proposal made by the Rainbow Municipal Water District).

Vote of the Electorate

We note that as part of the attached Resolution, the Water Authority Board requested that if for some reason the SD LAFCO were contemplating any approval of the Proposal, it should require a majority vote of the electorate in the Water Authority’s service area so that *all* affected ratepayers may have a say in any detachment, because a detachment may adversely affect all area ratepayers, and not just those in Fallbrook and Rainbow. While we realize this will be a material issue to be addressed in detailed briefing by all interested parties later, we wanted to call it to SD LAFCO’s attention as it is part of the Water Authority Board’s Resolution. This request is made without any prejudice to our member agencies making their positions known as well, or the Water Authority submitting further matters to SD LAFCO when the process continues.

Finally, we note – as shown on the below cc list – that Kristina Lawson is now our main contact person with our outside counsel at Hanson Bridgett, so please reflect this in your records. Her address information is as follows:

Kristina Lawson, Esq.
Hanson Bridgett
425 Market Street, 26th Floor
San Francisco, CA 94105
KLawson@hansonbridgett.com
(925) 746-8474

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The Water Authority looks forward to SD LAFCO's approval of our request/application after the COVID-19 health emergency concludes. Given the Water Authority's affected resources during this emergency period, the Water Authority reserves all rights to amend or supplement this application. Please let me know if the SD LAFCO requires any further information or wishes to discuss this matter with the Water Authority. Thank you.

Very truly yours,



Mark J. Hattam
General Counsel

Attachments: SDCWA Resolution and Board Memo

Cc: (all via e-mail):

Holly Whatley, Commission Counsel
Aleks Giragosian, Deputy Commission Counsel
Robert Barry, Chief Policy Analyst
Sandra L. Kerl, General Manager, San Diego County Water Authority
Kristina Lawson, Outside Counsel, San Diego County Water Authority
Gary Thompson, Executive Officer, Riverside LAFCO
Jack Bebee, General Manager, Fallbrook PUD
Paula C. P. de Sousa, Counsel, Fallbrook PUD
Paul Jones, General Manager, Eastern MWD
Nick Kanetis, Deputy General Manager, Eastern MWD
Tom Kennedy, General Manager, Rainbow MWD
Alfred Smith, Counsel, Rainbow MWD
Water Authority Board of Directors

RESOLUTION NO. 2019- 19

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE SAN DIEGO COUNTY WATER AUTHORITY AUTHORIZING THE GENERAL MANAGER AND GENERAL COUNSEL TO REQUEST A DETERMINATION BY THE SAN DIEGO COUNTY LOCAL AGENCY FORMATION COMMISSION THAT THE WATER AUTHORITY IS NOT A “DISTRICT” OR “SPECIAL DISTRICT” FOR THE PURPOSES OF PART 4 OF THE CORTESE-KNOX-HERTZBERG LOCAL GOVERNMENT REORGANIZATION ACT AND TO REQUEST A VOTE OF THE WATER AUTHORITY’S ELECTORATE AS TO ANY DETACHMENT.

WHEREAS, the Cortese-Knox-Hertzberg Local Government Reorganization Act (Cal. Gov. Code section 56000 et seq.) (“**CKH Act**”) at Government Code Section 56036.6 provides that a county water authority may apply to a Local Agency Formation Commission (“**LAFCO**”) for a determination that the county water authority is not a “district” or “special district” for the purposes of Part 4 (or Part 5) of the CKH Act pursuant to Government Code Sections 56036.6, 56127, and 56128;

WHEREAS, the San Diego County Water Authority (“**Water Authority**”) is a county water authority as described in Government Code Section 56036.6;

WHEREAS, the Water Authority anticipates that one or more applications for a change in organization that will affect, among others, the Water Authority and its member agencies will be filed with San Diego County LAFCO on behalf of Rainbow Municipal Water District (“**Rainbow**”) and/or Fallbrook Public Utility District (“**Fallbrook**”);

WHEREAS, the Water Authority’s principal act, the County Water Authority Act, provides procedures for a change in organization for county water authorities, as does the CKH Act;

WHEREAS, Government Code Section 53036.6 provides that if, upon application by a county water authority, a LAFCO determines that a county water authority is not a “district” or “special district,” then any authority proceedings pursuant to Part 4 of the CKH Act for a change of organization to the Water Authority (which proceedings follow the LAFCO’s commission proceedings) will be conducted pursuant to the County Water Authority Act;

WHEREAS, Part 4 of the CKH Act provides for a protest vote for any change of organization approved by the LAFCO, which results in a default approval of the LAFCO’s decision unless 25% of the registered voters in the designated territory protest the change of organization by signed mail-in vote, but the County Water Authority Act provides instead for a majority vote of the voters in the detaching agency service area to confirm the detachment/exclusion of that member agency from the Water Authority by majority approval at a general or special election;

WHEREAS, voters and ratepayers in service areas of member agencies of the Water Authority other than Rainbow and Fallbrook may be affected by a detachment of one or both of those agencies, and San Diego LAFCO may want to allow such larger electorate a chance to be heard on detachment;

WHEREAS, if a detachment application is not denied by San Diego LAFCO, then each applicable electorate should be afforded the opportunity to vote at a general or special election based on a full understanding of the potential impacts that would result from detachment and knowing all conditions that would be placed on the ratepayers of a detaching agency by LAFCO as a result of such a detachment;

WHEREAS, the CKH Act requires that if a proposal for a change in organization is initiated by other than the Water Authority, then the Water Authority may request the determination that it be deemed to be not a “district” or “special district” for purposes of Part 4 and/or 5 of the CKH Act as described in the first recital above within 10 days of notification by LAFCO of the initiation of the proposal; and

WHEREAS, the Water Authority is not engaged in: (a) the distribution and sale for any purpose, other than for the purpose of resale, of water or of gas, or electricity for light, heat, or power; (b) furnishing sanitary sewer service or garbage and refuse collection service to the ultimate users thereof; (c) providing fire or police protection; or (d) the acquisition, maintenance, lighting or operation of streets and highways, street and highway improvements or park and recreation facilities, except as an incident to the exercise of other lawful power of the Water Authority.

NOW, THEREFORE, the Board of Directors of the San Diego County Water Authority resolves the following:

1. In any LAFCO proceeding in which a change in organization is proposed that would detach or exclude Rainbow and/or Fallbrook from the Water Authority, the Water Authority shall request that if San Diego LAFCO does not deny the detachment application(s), that: (a) San Diego LAFCO exempt the proceeding from Part 4 of the LAFCO Act and, instead, proceed under the Water Authority’s principal act, the County Water Authority Act, for the purpose of the Authority Proceedings phase; and (b) in addition to any other appropriate conditions or Authority Proceeding requirements, San Diego LAFCO also require detachment approval by a majority of the voters within the Water Authority’s entire service area. The General Manager and the General Counsel, or their designees, are hereby authorized to request the foregoing as to the Rainbow and/or Fallbrook proceedings only, and to submit all applications and other necessary papers.

PASSED, APPROVED, and ADOPTED this 21st day of November 2019 by the following vote:

AYES: Unless noted below all Directors voted aye.

NOES: Bebee, Cate, Kennedy, and Steiner

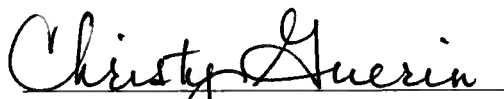
ABSTAIN: None

ABSENT: Ayala, Barnum, Boyle, Fong-Sakai, Hall, Mosca, Murtland, Scalzitti (P), Simpson, and Watkins (P).




Jim Madaffer, Chair

ATTEST:



Christy Guerin, Secretary

I, Melinda Nelson, Clerk of the Board of the San Diego County Water Authority, certify that the vote shown above is correct and this Resolution No. 2019- 19 was duly adopted at the meeting of the Board of Directors on the date stated above.



Melinda Nelson, Clerk of the Board



Our Region's Trusted Water Leader
San Diego County Water Authority

November 13, 2019

Attention: Board of Directors

Resolution Regarding LAFCO Part 4 Exemption Request. (Action)

Staff recommendation

Adopt Resolution 2019-___ (Attachment 1) authorizing General Manager and/or General Counsel to Apply to LAFCO to:

- Exempt a Rainbow and/or Fallbrook detachment/annexation proceeding from Part 4 of the Cortese-Knox-Hertzberg Act, and instead have any "Authority Proceedings" conducted under the County Water Authority Act; and
- In addition to any other LAFCO requirements, request that LAFCO condition approval of any detachment on a majority vote of the entire Water Authority electorate.

Alternative

Do not adopt the Resolution.

Fiscal Impact

There is no identifiable fiscal impact from this action, which pertains to a procedural issue at San Diego Local Agency Formation Commission ("LAFCO").

Executive Summary

- Rainbow Municipal Water District (“**Rainbow**”) and/or Fallbrook Public Utility District (“**Fallbrook**”) may soon file applications with the San Diego Local Agency Formation Commission (“**LAFCO**”) to detach from the Water Authority and annex into Eastern Municipal Water District (“**Eastern**”) in Riverside County (together the detachment and annexation are the “**Reorganization.**”)
- This Reorganization, under which member agencies of one regional public entity would annex into a different county’s regional public entity, appears to have no precedent in San Diego County.
- The LAFCO proceedings will be conducted in phases, and if the LAFCO approves the Reorganization, it will still be subject to a local protest vote, called “Authority Proceedings.”
- Under LAFCO law, the Authority Proceedings can require a *protest* vote; however, the Water Authority is entitled to seek the LAFCO’s approval to instead conduct the Authority Proceedings as a *majority-vote election* in at least the Rainbow and Fallbrook service areas.
- LAFCO may also condition its approval of a Reorganization on certain terms and conditions, including requiring an Authority Proceeding vote to be conducted only among voters in the detaching areas, or also among the voters in the entire Water Authority service area. The latter approach would allow for voters region-wide to ratify a potential LAFCO approval of the Reorganization, giving those ratepayers a voice in the future economic and other impacts that would result from detachment from the Water Authority.

Background

Beginning in at least Fall of 2018, member agencies Fallbrook and Rainbow initiated plans to seek to detach from the Water Authority and annex into Eastern Municipal Water District, located in Riverside County. Fallbrook and Rainbow began discussions with Eastern as early as fall of 2018, and then began discussions with San Diego and Riverside LAFCOs by January of 2019.

In May of 2019, the Acting General Manager of the Water Authority was informed by the General Manager of Rainbow that both Rainbow and Fallbrook were planning to seek to detach from the Water Authority. A general proposal has now been publicly discussed by Fallbrook and Rainbow, but the specifics of the infrastructure changes and financial approach have not been made clear.

Rainbow and Fallbrook have stated at their respective board meetings that applications for detachment are being drafted and may be filed as early as December 2019.

Water Authority’s Involvement to Date

Applicable LAFCO. Initially, Rainbow and Fallbrook would have had the LAFCO matters decided at two different LAFCOs – Riverside County and San Diego County. In an effort to have a consolidated set of proceedings, improve coordination and efficiency, and maintain local control of

decisions in San Diego County, the Water Authority requested that the San Diego LAFCO take exclusive jurisdiction over the matters. In October 2019, the two LAFCOs agreed to an MOU under which exclusive jurisdiction is vested in San Diego LAFCO.

Fact Finding. The Water Authority made Public Records Act requests in order to understand the scope of the plans and the history of discussions. Additionally, meetings between staff were conducted in July, and were followed by a general proposal from Rainbow and Fallbrook in August, which again provided little detail or analysis of impacts. Further meetings were conducted in September and early October, but to date the Water Authority has not been presented by Rainbow or Fallbrook with any detailed proposals, or with any substantive analyses of what the projected impacts to water supply reliability, rates, or infrastructure would be to the Water Authority and to each of its member agencies. The Water Authority has asked Rainbow and Fallbrook for these details, including in a recent October 14, 2019, letter sent by special counsel, and previously provided to each of the Board members. A copy is attached as Attachment 2.

Anticipated Procedure

LAFCO Nomenclature. A detachment from the Water Authority will require multiple acts and approvals by San Diego LAFCO. Procedurally, it will require changes to the “sphere of influence” for the Water Authority, Rainbow, Fallbrook, and Eastern, as well as the detachment of Rainbow and Fallbrook from the Water Authority, and the annexation of Rainbow and Fallbrook to Eastern. All of these will be handled in one consolidated proceeding, but are governed under separate parts of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, Government Code sections 56000 *et seq.* (also known as the “**CKH Act**” or the “**LAFCO Act.**”) Annexations and detachments are also collectively known as “boundary changes” or “reorganizations.”

Consultations. Under local LAFCO policy, the applicants must consult with affected local agencies prior to submitting their applications, in order to identify and attempt to resolve any issues raised by the proposed reorganizations. Because it is possible that the proposed Reorganization would have significant financial and potential environmental impacts on the Water Authority all of its member agencies, as well as other agencies such as fire districts, all of those parties are affected local agencies with which the applicants should consult. The consultations, to be meaningful, must be based on a proposal that specifies the changes that would occur under a Reorganization. Special Counsel sent a letter to this effect to Rainbow and Fallbrook on October 14, 2019 (Attachment 2). We will continue to work with San Diego LAFCO to ensure that meaningful consultations are conducted prior to San Diego LAFCO’s accepting the applications.

Application and Commission Proceedings. Rainbow and Fallbrook would, if they go forward, subsequently submit applications (or perhaps a consolidated single application) to San Diego LAFCO and pay associated fees.

Once LAFCO determines that the application is complete, it will notify all affected agencies, including the Water Authority, and solicit public engagement and comments. The Water Authority, its member agencies and all other affected parties will have an opportunity to participate in this process.

LAFCO will then undertake an independent analysis of the proposal. This may take many months.

Upon the conclusion of that analysis, LAFCO staff will prepare a report and recommendation, provide notice, and hold a public hearing. The Water Authority and its member agencies and all other affected local parties will have an opportunity to review the analysis and report, and participate in the public hearing.

The Commission will then vote on the application. These initial procedures are referred to as the “Commission Proceedings.” (*See* Cal. Gov. Code § 56650 *et seq.*) If the application is denied, the process ends. If the application is approved (with any associated conditions), then “Authority Proceedings” may follow.

It is important to note that LAFCO may place a number of conditions on any approval. Cal. Gov. Code Section 56886 gives LAFCO a considerable amount of leeway in fashioning terms and conditions of a detachment, including imposing requirements from the principal act, here the CWA Act.

Authority Proceedings. Following the approval of an application by LAFCO, the LAFCO Act provides for a second process, known as the “Authority Proceedings.”

LAFCO Act Authority Proceedings:

The default approach to Authority Proceedings is a “protest” proceeding under which the affected territory’s voters may mail in a protest to oppose the LAFCO’s approval/decision. If fewer than 25% of ratepayers in the affected territory protest, then the application is deemed approved. If 50%+1 of the registered voters protest the proposal, then it is deemed denied. If 25-50% of the registered voters protest the proposal, then the proposal goes to the voters in a general or special election where it is subject to a majority vote. LAFCO may provide for the voter pool to be just Rainbow and Fallbrook, or the entirety of the four affected entities (Fallbrook, Rainbow, Water Authority and Eastern), or some subset of those. Historically it has proven procedurally cumbersome for a large electorate to affirmatively lodge 25%+ protests, especially because protest proceedings are unfamiliar to most voters. If that standard is not met, then under “Authority Proceedings” there might not be a vote of the electorate at all.

CWA Act Authority Proceedings:

In the alternative, the Water Authority may apply to LAFCO to opt out of the protest procedure in the LAFCO Act, and instead conduct the Authority Proceedings pursuant to its principal act, the County Water Authority Act (“**CWA Act**”). This would ensure the voters have an opportunity to vote on the proposal at a standard regular or special election.

In order to seek to proceed under the CWA Act instead of Part 4 of the LAFCO Act, the Water Authority would need to apply to LAFCO for exemption from Part 4 within 10 days after notification that the initial application is complete. That option is allowed when an agency is not engaged in: (a) the distribution and sale for any purpose, other than for the purpose of resale, of water or of gas, or electricity for light, heat, or power; (b) furnishing sanitary sewer service or

garbage and refuse collection service to the ultimate users thereof; (c) providing fire or police protection; or (d) the acquisition, maintenance, lighting or operation of streets and highways, street and highway improvements or park and recreation facilities, except as an incident to the exercise of other lawful power of the Water Authority. The Water Authority, as a water wholesaler, satisfies the statutory requirement.

Terms and Conditions Imposed by LAFCO:

In addition to a vote in the Rainbow and Fallbrook service areas, San Diego LAFCO Commissioner Dianne Jacob suggested at the October 7, 2019, LAFCO meeting that voters within the Water Authority's entire 24-member agency service area perhaps should have an opportunity to evaluate and vote upon a detachment, as they may be affected by such a change in organization. It is within the discretion of the LAFCO to provide terms and conditions for reorganization. Consistent with Commissioner Jacob's suggestion, and assuming that LAFCO's analysis of the applications demonstrates that there will be financial impacts on ratepayers, in order to enfranchise all of the Water Authority's affected ratepayers on this issue it is therefore recommended that the Water Authority specifically request that such a vote of the larger affected electorate be considered as a condition of detachment (if detachment were to be approved; of course, detachment may also be denied by San Diego LAFCO). The below staff recommendation would ensure that all affected ratepayers are entitled to vote (including those in Rainbow and Fallbrook as specified in the CWA Act).

Request for Board Action

The Board is therefore requested to adopt the Attachment 1 Resolution that would authorize the General Manager and General Counsel, or their designees, to do the following upon notification of a detachment application filed with San Diego LAFCO by Rainbow or Fallbrook:

1. Request that San Diego LAFCO exempt the proceeding from Part 4 of the LAFCO Act and instead proceed under the Water Authority's principal act, the County Water Authority Act, for the purpose of voter approval of any LAFCO-approved detachment in the Authority Proceedings phase; and
2. Request that if San Diego LAFCO does not deny the detachment application(s), that – in addition to any other appropriate conditions or Authority Proceeding requirements the LAFCO may specify – San Diego LAFCO also require detachment approval by the voters within the Water Authority's entire service area.

Prepared by: Claire Hervey Collins, Special Counsel
Approved by: Sandra L. Kerl, Acting General Manager
Mark J. Hattam, General Counsel

Attachments:
Attachment 1 - Resolution 2019-____
Attachment 2 - October 14, 2019 Letter

RESOLUTION NO. 2019-___

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE SAN DIEGO COUNTY WATER AUTHORITY AUTHORIZING THE GENERAL MANAGER AND GENERAL COUNSEL TO REQUEST A DETERMINATION BY THE SAN DIEGO COUNTY LOCAL AGENCY FORMATION COMMISSION THAT THE WATER AUTHORITY IS NOT A “DISTRICT” OR “SPECIAL DISTRICT” FOR THE PURPOSES OF PART 4 OF THE CORTESE-KNOX-HERTZBERG LOCAL GOVERNMENT REORGANIZATION ACT AND TO REQUEST A VOTE OF THE WATER AUTHORITY’S ELECTORATE AS TO ANY DETACHMENT.

WHEREAS, the Cortese-Knox-Hertzberg Local Government Reorganization Act (Cal. Gov. Code section 56000 et seq.) (“**CKH Act**”) at Government Code Section 56036.6 provides that a county water authority may apply to a Local Agency Formation Commission (“**LAFCO**”) for a determination that the county water authority is not a “district” or “special district” for the purposes of Part 4 (or Part 5) of the CKH Act pursuant to Government Code Sections 56036.6, 56127, and 56128;

WHEREAS, the San Diego County Water Authority (“**Water Authority**”) is a county water authority as described in Government Code Section 56036.6;

WHEREAS, the Water Authority anticipates that one or more applications for a change in organization that will affect, among others, the Water Authority and its member agencies will be filed with San Diego County LAFCO on behalf of Rainbow Municipal Water District (“**Rainbow**”) and/or Fallbrook Public Utility District (“**Fallbrook**”);

WHEREAS, the Water Authority’s principal act, the County Water Authority Act, provides procedures for a change in organization for county water authorities, as does the CKH Act;

WHEREAS, Government Code Section 53036.6 provides that if, upon application by a county water authority, a LAFCO determines that a county water authority is not a “district” or “special district,” then any authority proceedings pursuant to Part 4 of the CKH Act for a change of organization to the Water Authority (which proceedings follow the LAFCO’s commission proceedings) will be conducted pursuant to the County Water Authority Act;

WHEREAS, Part 4 of the CKH Act provides for a protest vote for any change of organization approved by the LAFCO, which results in a default approval of the LAFCO’s decision unless 25% of the registered voters in the designated territory protest the change of organization by signed mail-in vote, but the County Water Authority Act provides instead for a majority vote of the voters in the detaching agency service area to confirm the detachment/exclusion of that member agency from the Water Authority by majority approval at a general or special election;

WHEREAS, voters and ratepayers in service areas of member agencies of the Water Authority other than Rainbow and Fallbrook may be affected by a detachment of one or both of those agencies, and San Diego LAFCO may want to allow such larger electorate a chance to be heard on detachment;

WHEREAS, if a detachment application is not denied by San Diego LAFCO, then each applicable electorate should be afforded the opportunity to vote at a general or special election based on a full understanding of the potential impacts that would result from detachment and knowing all conditions that would be placed on the ratepayers of a detaching agency by LAFCO as a result of such a detachment;

WHEREAS, the CKH Act requires that if a proposal for a change in organization is initiated by other than the Water Authority, then the Water Authority may request the determination that it be deemed to be not a “district” or “special district” for purposes of Part 4 and/or 5 of the CKH Act as described in the first recital above within 10 days of notification by LAFCO of the initiation of the proposal; and

WHEREAS, the Water Authority is not engaged in: (a) the distribution and sale for any purpose, other than for the purpose of resale, of water or of gas, or electricity for light, heat, or power; (b) furnishing sanitary sewer service or garbage and refuse collection service to the ultimate users thereof; (c) providing fire or police protection; or (d) the acquisition, maintenance, lighting or operation of streets and highways, street and highway improvements or park and recreation facilities, except as an incident to the exercise of other lawful power of the Water Authority.

NOW, THEREFORE, the Board of Directors of the San Diego County Water Authority resolves the following:

1. In any LAFCO proceeding in which a change in organization is proposed that would detach or exclude Rainbow and/or Fallbrook from the Water Authority, the Water Authority shall request that if San Diego LAFCO does not deny the detachment application(s), that: (a) San Diego LAFCO exempt the proceeding from Part 4 of the LAFCO Act and, instead, proceed under the Water Authority’s principal act, the County Water Authority Act, for the purpose of the Authority Proceedings phase; and (b) in addition to any other appropriate conditions or Authority Proceeding requirements, San Diego LAFCO also require detachment approval by a majority of the voters within the Water Authority’s entire service area. The General Manager and the General Counsel, or their designees, are hereby authorized to request the foregoing as to the Rainbow and/or Fallbrook proceedings only, and to submit all applications and other necessary papers.

PASSED, APPROVED, and ADOPTED this 21st day of November 2019 by the following vote:

AYES: Unless noted below all Directors voted aye.

NOES:

ABSTAIN:

ABSENT:

Jim Madaffer, Chair

ATTEST:

Christy Guerin, Secretary

I, Melinda Nelson, Clerk of the Board of the San Diego County Water Authority, certify that the vote shown above is correct and this Resolution No. 2019- ____ was duly adopted at the meeting of the Board of Directors on the date stated above.

Melinda Nelson, Clerk of the Board



Claire Hervey Collins
633 West 5th Street, Suite 4000
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October 14, 2019

File No. 44112.2

Mr. Jack Bebee
General Manager
Fallbrook Public Utility District
900 East Mission Road
Fallbrook, CA 92028
jackb@fpud.com

Re: LAFCO Process

Dear Mr. Bebee:

As special LAFCO counsel to the San Diego County Water Authority ("Water Authority"), Chair Madaffer has asked me to respond to your October 10 letter to him on behalf of the agency.

First, as has been stated many times, the Water Authority must respect the interests of all water ratepayers served by our 24 member agencies in San Diego County. We plan to do that and stand ready to support a fully transparent LAFCO process.

Second, I am addressing this letter to you as the author of the October 10 letter, and I am copying your General Counsel. The Water Authority urges you to consult with your General Counsel or other qualified LAFCO counsel as soon as possible in order to ensure that Fallbrook Public Utility District ("Fallbrook") is following the LAFCO process, and to ensure that Fallbrook understands the Water Authority's responsibility in that process. I am copying Mr. Kennedy and his agency's General Counsel for the same reason. I believe that it is imperative that Fallbrook and Rainbow Municipal Water District ("Rainbow") take certain necessary consultation actions in light of your stated imminent plans to file a LAFCO detachment proposal.

The pace of the LAFCO process has been designed by statute and local policy to be a thorough, collaborative, and deliberative process. The responsibility for preparing a comprehensive proposal and engaging in meaningful consultations with affected agencies is a significant and serious one. Your apparent frustration at the response to date by the Water Authority is a reflection of the lack of detail and analysis in the materials provided by Fallbrook and Rainbow to the Water Authority, and a reflection of the lack of meaningful dialogue about the impacts of potential detachment. It is not the result of any actions taken or not taken by Chair Madaffer or the Water Authority, which is eager to better understand Fallbrook and Rainbow's detailed plan so that it can undertake a rigorous analysis of the related impacts. To be clear, however, the Water Authority has no duty to formulate a proposal for your agencies, or to formulate an "offer" on behalf

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of its other member agencies. It does have a duty of good faith to review and consult with you on a genuine proposal, but due to the lack of specifics from your agencies as to exactly what you plan, it is unable to do so at this time.

Against this backdrop, and in the interest of fairness and to promote mutual understanding, I will take this opportunity to comment on some of the points raised in your October 10 letter.

San Diego LAFCO Legislative Policy No. L-107:

San Diego LAFCO's legislative policy L-107 establishes a consultation requirement among affected agencies **prior to the filing of a detachment proposal**, stating in part:

It is the policy of the San Diego Local Agency Formation Commission that:

1. Prior to submission of a proposal requesting LAFCO consideration of a change of organization or reorganization, **the proposal applicant and representatives from affected public agencies, interested parties, and/or organizations, shall meet at the earliest possible stage for the purpose of identifying and attempting to resolve any issues associated with the proposed jurisdictional change(s)**. The Executive Officer may waive the consultation procedure outlined in this provision when it can be determined with certainty that there will be no possibility that the proposal in question will result in identified and unresolved jurisdictional issues.
2. The consultation process described in provision no. 1 should identify any jurisdictional issues or concerns related to: a. Differing development standards; b. Existing and/or planned land uses and zoning, including densities, community character, and appropriate jurisdictional transition areas; c. Existing and/or planned provision of governmental services, including any potential impacts to service levels or financial ability to sustain service levels; and, d. Any other local community or governmental concerns.

* * *

6. Affected local agencies shall be encouraged to explore additional methods to improve future inter- and intra-departmental and jurisdictional communications for the purpose of discussing and commenting on proposed or pending jurisdictional changes at the earliest possible stage.

Consultation Process:

With due respect, the Water Authority does not agree that all necessary steps have been taken to satisfy L-107 requirements.

First, although your agencies have been discussing a possible detachment among yourselves for a full year now, very few concrete details have been revealed to the Water Authority

or to the public.¹ The very broad “framework” you have provided does not include the kind of substantive detail necessary to evaluate such a significant service change, particularly in light of the more than 50 years of water service to Fallbrook and Rainbow by the Water Authority. You are required to provide an analysis outlining the potential effects of detachment on the Water Authority and all of its member agencies, including Fallbrook and Rainbow customers.² We renew our request for a detailed proposal consistent with LAFCO requirements.³

Detailed Proposal Needed:

In order to have a productive consultation process, all affected parties (as defined in L-107) need to be provided with the specific details of your detachment proposal including financial and environmental impacts, impacts on water supply reliability, and all other impacts to the region as a whole that would result from a detachment.⁴

Because Fallbrook and Rainbow are the agencies proposing detachment, it is your responsibility, not the Water Authority’s responsibility, to conduct the relevant analyses and make a detailed proposal addressing all relevant factors. For example:

- You are aware that a number of Water Authority member agencies have expressed concerns about Fallbrook and Rainbow’s share of Water Authority financial obligations, incurred to develop the reliable, firm water supplies now being delivered to Fallbrook and Rainbow and all Water Authority member agencies. You should be prepared to discuss this topic when you meet with the other member agencies. Your proposal should indicate how you plan to address this concern, as well as how your proposal would impact customer rates (including those of Fallbrook and Rainbow), if at all.
- We have not been given any details as to environmental impacts, but note comments in the PRA documents that significant new piping infrastructure may be needed in Rainbow and

¹ The Water Authority only became aware of this timeline from documents produced by Fallbrook and Rainbow in response to its Public Records Act (PRA) request. While your agencies began at an early stage to consult with the Eastern Municipal Water District, you did not share your intentions with the Water Authority until just this past May.

² We attach Water Authority Acting General Manager Sandy Kerl’s e-mail to you dated October 10, which was not attached to your letter. In that e-mail, Ms. Kerl noted that Fallbrook and Rainbow had not provided the specifics of any proposal to the Water Authority. The document you submitted on August 21, 2019, was really an advocacy piece arguing why detachment might make sense for your agencies. This is not the kind of substantive proposal or analysis of impacts required by LAFCO.

³ This is why your requests for a Water Authority open session agenda item about detachment, before submittal of a detailed written proposal, were premature. This is not a “political” decision, but must be one based on what is in the best interests of the voters and ratepayers in San Diego County.

⁴ This is not intended to be an exhaustive list of issues or substitute for legal advice by your own attorneys on LAFCO requirements.

perhaps Fallbrook. Additionally, a detachment from the Water Authority (which uses very little water from the environmentally sensitive Bay Delta region, and will use even less over time) would, under your plan, be replaced by increased reliance on Delta water from MWD. This shift should be analyzed, particularly in light of Water Code section 85021. Review of these and other potential environmental impacts should be completed before any applications are filed with LAFCO, with all affected parties described under LAFCO Policy L-107 being provided a reasonable time and opportunity to comment.

These are only a few examples of the kinds of impacts that should be included in a detailed proposal to be presented to and discussed with affected parties during the consultation process.

Next Steps:

The Water Authority is fully committed to working through the LAFCO process—but the process must start with your agencies' good faith efforts to present a proposal grounded in facts and substantive analysis, including a reasonable range of alternative outcomes. You must provide sufficient information to allow all parties, and ultimately all voters and ratepayers, to make informed decisions about the proposed detachment.

Once you have prepared the terms of your proposal, Fallbrook and Rainbow can begin the process of meeting with all affected agencies and parties to identify and attempt to resolve issues, as required under LAFCO policy.⁵ This will provide an opportunity to identify areas of agreement, disagreement, and further areas of inquiry necessary to present a meaningful application to LAFCO.

I would be happy to discuss next steps with your counsel in order to avoid further frustration and wasted effort on the part of all parties.

Very truly yours,



Claire Hervey Collins of
LEWIS BRISBOIS BISGAARD & SMITH LLP

CHC:JLB

Attachment

⁵ Chair Madaffer's August 21 letter to Fallbrook and Rainbow did not say anything to the contrary; in fact, he reiterated then that he asked you to "please provide a specific proposal." Chair Madaffer was not addressing your LAFCO obligations in his letter—he was only asking that you cease "public relations" meetings with Water Authority directors telling them that the Water Authority was refusing to meet with you.

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cc: Water Authority Board of Directors
Fallbrook Board of Directors
Rainbow Board of Directors
Mark Hattam, Water Authority General Counsel
Sandy Kerl, Water Authority Acting General Manager
Water Authority member agency General Managers
Paula de Sousa Mills, General Counsel for Fallbrook, Best Best & Krieger
Tom Kennedy, Rainbow General Manager
Lloyd W. Pellman, Counsel for Rainbow, Nossaman

From: Kerl, Sandy

Sent: Thursday, October 10, 2019 12:52 PM

To: Bebee, Jack <jackb@fpud.com>; Kennedy, Tom <tkennedy@rainbowmwd.com>

Cc: Madaffer, Jim <JMadaffer@sdewa.org>; Croucher, Gary <garydcroucher@gmail.com>; Guerin, Christy <Redwhtblu56@yahoo.com>

Subject: Follow-Up on Meeting of October 9, 2019

Dear Jack and Tom:

This e-mail follows our meeting yesterday, as promised. The Water Authority appreciates the opportunity for continuing dialogue with you and all of our member agencies on this subject.

While I regret the frustration you expressed at our meeting yesterday, I want to be clear that from our perspective, the process going forward has now been established by the LAFCO board action taken on Monday, October 7. We believe LAFCO policy requires that your agencies, as the potential LAFCO applicants, meet with **all affected parties** prior to your filing with LAFCO, in an attempt to reach agreement on the issues presented.

The LAFCO policy (L-107) is expressly referenced in the letter that was submitted to LAFCO by the Otay Water District (copy attached). The policy clearly states a requirement that applicants meet with all affected agencies to walk through their proposal to try and reach a resolution. While we appreciate you meeting with the Water Authority, that alone does not satisfy LAFCO's policy.

I also derived from our meeting yesterday that you believe it is the Water Authority's responsibility to make some sort of "offer" to you. We would not be in a position to do that, even if we had the specific details of your proposal (we do not), because the potential impacts are not only on the Water Authority but also on its member agencies, their ratepayers and potentially other third parties.

Finally, you said that you wanted to know our agency's legal interpretation of the applicable law as to why your agencies should pay anything upon detachment. This is an issue that will be addressed in the course of LAFCO proceedings.

As I indicated to you, the Water Authority must continue to represent the interests of all of our member agencies. We plan to do that and stand ready to support the LAFCO process.

Best regards,

Sandy

Sandra L. Kerl
Acting General Manager

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skerl@sdewa.org

