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April 20, 2015

VIA E-MAIL AND U.S. MAIL

dhulett@maldef.org

Denise Hulett
National Senior Counsel
Mexican American Legal Defense and Educational Fund
1512 14th Street
Sacramento, CA 95814

Re: Your letter of March 18, 2015

Dear Ms. Hulett:

This law firm represents the Fallbrook Public Utility District (“District”) and has reviewed your letter dated March 18, 2015, concerning the California Voting Rights Act (“CVRA”). That letter requested a response by today to MALDEF’s demand that the District change its at-large election system to a district-based system.

As you appear to be aware, the District is in the midst of pursuing a change of organization that would essentially combine the District with the Rainbow Municipal Water District. In response to similar CVRA-related concerns raised by the Rainbow district, and in specific response to a request for evidence from the San Diego Local Agency Formation Commission (“LAFCO”), we conducted a review of the demographics of the District and of past District elections. A copy of that letter is enclosed for your reference.

The District does not dispute the population figures cited in your letter or the apparent fact that the District has not had any Latino board members for at least seven election cycles. Nor does it appear to us that there have been any Latino candidates during that time period. The absence of Latino candidates could mean that none were interested in running for office. Or, it could mean, as you suggest, that there was racially polarized voting. However, we cannot conclude, in the absence of evidence (and in particular a more sophisticated regression analysis), that the lack of Latino candidates for the District board automatically leads to a conclusion that there is or has been racially polarized voting. No entity that we are aware of (including the District, the Rainbow Municipal Water District, LAFCO, or MALDEF) has yet to incur the



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expense of hiring an expert to conduct that type of analysis. We are, though, in the middle of further analyzing information Rainbow provided to LAFCO concerning election results from statewide races.

In order to cure the alleged CVRA violation, MALDEF demands that the District change to a district-based system. We interpret that request to mean that the District change to a “by-district” election where individual candidates must reside in a specific district and where only voters who reside within a particular district may vote for candidates running in their specific district (as opposed to a “from-district” election where voters district-wide vote for candidates from specific districts).

As you are undoubtedly aware, the process from changing to an at large election system to a by-district system varies depending on the type of agency involved. For example, a charter city may take discretionary action to change its election system pursuant to its own charter provisions as elections are considered a matter of local, not state, concern under the California Constitution. *See* Cal. Const. art. XI, § 3(a), § 5(b) (permitting charters to provide for the conduct of city elections). On the other hand, general law cities may take discretionary action to implement district elections after following a legislatively proscribed statutory procedure requesting voter approval to change from an at-large to either a by-district or from-district system. *See* Gov’t Code § 34871. Similarly, a legislatively proscribed statutory process permits a community college district to change to a by-district election system from an at-large one provided the district’s board takes discretionary action to adopt a resolution providing for the change and then receives approval from the Community College Board of Governors. Education Code § 72036.

The District’s powers are similarly derived from state statute, and the District is subject to Public Utilities Code section 15951 *et seq.*, which specifies the processes for the District’s elections. The District presently has no statutory authority, and we have not been provided with any statutory (or other) citations to the contrary that permit the District to change its election procedures. Other public utilities districts that we are aware of have specific legislative authority to change to district elections. *See, e.g.* Public Utilities Code § 15961.5 (district wholly or partially within Placer County may change to a by-ward system provided the board of supervisors approves of the change); § 15975 (Georgetown Divide Public Utilities District may change to a by-ward system provided certain processes are followed and approvals received).

We would be more than happy to review any legal authority MALDEF may have that would permit the District to make the change from an at-large to a by-district election and any additional information MALDEF may have concerning racially polarized voting within the



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District. If you have any questions or would like to further discuss this matter, please feel free to contact either of us.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kara K. Ueda'.

Kara K. Ueda
Paula C. P. de Sousa
of BEST BEST & KRIEGER LLP

KKU:cp
Enclosure: April 10, 2015 letter to San Diego LAFCO
cc: Brian Brady, FPUD General Manager
Robert James, FPUD General Counsel



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April 10, 2015

VIA E-MAIL AND U.S. MAIL

Mr. Michael Ott
Executive Officer
San Diego Local Agency Formation Commission
9335 Hazard Way, Suite 200
San Diego, CA 92123

Re: California Voting Rights Act

Dear Mr. Ott:

This response is being submitted on behalf of the Fallbrook Public Utility District (“District”) in response to a letter from you dated March 11, 2015, requesting information regarding the applicability of the California Voting Rights Act (“CVRA”) to the Fallbrook PUD.

Overview of the California Voting Rights Act

As you are aware, the California Voting Rights Act was enacted in 2002, is codified at Elections Code sections 14027-14032, and focuses on the use of at-large election systems. At-large elections are of three primary types: (1) where voters of the entire jurisdiction cast votes to elect the entire membership of the board [the traditional at-large system]; (2) where voters reside within given areas of the jurisdiction (districts), and the voters of the entire jurisdiction elect members of the governing body from individual districts [voting from district]; or (3) a combination of both at-large elections and district-based elections. Each of these three methods is distinguished from a “by-district” election where a jurisdiction is divided into multiple districts, and voters in each district elect their representative who must reside in that particular district.

In order for a plaintiff to succeed under the CVRA, he or she must establish that racially polarized voting exists. Racially polarized voting occurs when a protected minority group has a preference for one candidate or issue while the majority has a preference for a different candidate or issue. A protected class of voters is one whose members are of a race, color, or language minority group. California law explicitly refers to the methodology used by federal courts in



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analyzing federal Voting Rights Act cases for determining whether racially polarized voting exists.

Analyzing Whether Racially Polarized Voting Exists

One way of evaluating whether racially polarized voting is present is to determine whether there were candidates who are members of a protected class who were both preferred by voters of that particular class and who were not elected to the legislative body of the particular jurisdiction. The evidence involved in this type of evaluation involves examining the results of elections where at least one candidate was a member of a protected class or elections involving ballot measures, or other electoral choices where it can be argued that the rights and privileges of members of a protected class were or could have been affected. Other efforts to determine racially polarized voting are more complex and require additional modeling and statistical tools, including regression analysis and examining voting behavior on a precinct level.

Given the relatively short amount of time the District was given to gather evidence and to prepare its response to LAFCO, the District engaged in the former type of review and data collection as it did not have the resources to conduct the more complex data analysis, which would have required hiring an expert consultant.

The District evaluated two different data sets: population data and District election results from the time period of 1992 through 2014.

1. Population Data

It is our opinion that using Citizen Voting Age Population (“CVAP”) data is the most accurate way to evaluate the potential for racially polarized voting. CVAP data differs from United States census data in two important respects. The first distinction is that the census counts every single person within a particular jurisdiction while CVAP data only counts United States citizens who are of voting age (18). In other words, CVAP data accounts for every eligible voter regardless of whether they are registered to vote or not. The second distinction is that the United States census data is collected every ten years while the CVAP data is collected on a rolling five-year basis. CVAP data is obtained from the American Community Survey (“ACS”) (available at http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html). Thus, both data sets provide only snapshots of a particular moment in time rather than present population information. One limitation with respect to CVAP data is that it may require a statistical adjustment due to the aging of the population, meaning that there may be more people of voting age than the data would suggest. Additionally, CVAP data is not based on a full count (as the census is) but is a population estimate.



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However, despite these limitations in the ACS data, the Ninth Circuit Court of Appeals has upheld the use of CVAP data in assessing Voting Rights Act compliance, and voting rights experts we are familiar with advocate for its use over census data. *See Romero et al. v. City of Pomona et al.*, 883 F.2d 1418, 1426 (9th Cir. 1989), overruled on other grounds by *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990). In *Romero*, the Ninth Circuit Court of Appeals explained that it assessed geographical compactness “based upon the number of eligible minority voters, rather than total minority population.” *Id.*, citing *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988).

The District obtained data from the ACS for the 2009-2013 five-year period for the Fallbrook Census Designated Place (“CDP”). The boundaries of the Fallbrook CDP and the District are not coterminous in that the District’s geographical area is smaller than the CDP, and the CDP includes a portion of the Rainbow Municipal Water District. While we believe the CVAP data to be representative of the District’s population, we cannot definitively reach that conclusion and cannot represent that it is identical to the District. Moreover, District staff attempted to further refine the CVAP data to analyze CVAP data at the precinct level but were unable to do so with the District’s available resources. The CVAP data for this time period is as follows:

Category	Total # People	18 or Older	Citizens	Citizens 18 or Older (CVAP)
Total	30,285	23,315	25,160	18,525
American Indian or Alaska Native	25	25	25	25
Asian	1,000	885	545	425
Black/African-American	870	790	860	790
Native Hawaiian or Other Pacific Islander	15	15	15	15
White	15,945	13,215	15,360	12,675
American Indian or Alaska Native and White	105	70	105	70
Asian and White	165	85	165	85
Black/African-American and White	40	10	40	10
Two or more Races, Other	80	80	45	45
Hispanic or Latino	12,045	8,140	8,005	4,380

Based on the CVAP data for the 2009-2013 years, there were 18,525 citizens 18 years or older in the Fallbrook Census Designated Place. Of those, a little over two-thirds were white, and



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4,380 were Hispanic or Latino, or 23.6 percent. The other ethnic minorities were all much smaller in comparison. Based on this data, we are unable to conclude that any class of minority voters could influence an election; we are also unaware of their political cohesiveness, if any. We are also unable to conclude whether it would be possible to draw a majority-minority district (or a district close to a majority-minority).

2. Elections Data

In addition to analyzing the CVAP data, the District also reviewed San Diego County Elections data for all Fallbrook PUD elections from 1992 through 2014. We understand that this data does not necessarily reflect each District director as some directors during this time period appear to have ran unopposed, and others were appointed following resignations.

Year and Seat	Candidate Name	Count	Percent
1992, Seat 1	Roger Willis	3,420	57.77%
	W.A. (Bill) Morgan	2,500	42.23%
1994, Seat 4	Arne N. Gunnarsson	3,336	50.95%
	Charley Wolk	3,212	49.05%
1994, Seat 5	Milt Davies	3,067	48.47%
	Merritt S. Dunlap	1,898	30.00%
	Mary F. Mc Neil	1,362	21.53%
1996, Seat 1	N.R. "Nick" Hoskot, Jr.	3,224	50.60%
	Mary Fallon Mc Neil	3,147	49.40%
1996, Seat 2	Pat Knock	3,272	52.83%
	Carol S. Eastman	2,921	47.17%
1996, Seat 3	Bob Francis	3,470	54.85%
	William E. Ross	2,856	45.15%
1998, Seat 4	Arne Gunnarsson	2,242	39.74%
	Luther Ballou	1,167	20.68%
	John W. Crawford	1,161	20.58%
	Sandra L. Mc Cart	1,072	19.0%



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2000, Seat 1	Hubert "Bert" Hayden	4,459	62.64%
	Nick Hoskot	2,660	37.36%
2000, Seat 2	Russell Mc Kissick	4,312	62.09%
	Mary F. Mc Neil	2,633	37.91%
2002, Seat 4	Arne Gunnarsson	3,718	59.8%
	Al W. Gebhart	2,497	40.1%
2002, Seat 5	Milt Davies	3,486	57.7%
	Archie – Art- Mc Phee	2,550	42.2%
2002, Seat 2	Keith Battle	2,547	41.0%
	Mary F. Mc Neil	1,982	31.9%
	Lou Ballou	1,677	27.0%
2004, Seat 3	Don Mc Dougal	5,354	58.04%
	Archie Mc Phee	3,858	41.82%
2006, Seat 4	Al Gebhart	Unopposed	100%
2006, Seat 5	Milt Davies	Unopposed	100%
2008, Seat 2	Keith Battle	4,724	50.53%
	Archie Mc Phee	4,598	49.18%
2010, Seat 4	Archie Mc Phee	4,192	57.84%
	Alvin W. Gebhart	3,037	41.90%
2012, Seat 2	Alvin W. Gebhart	4,911	54.74%
	Tony Pack	4,046	45.10%
2014, Seat 4	Charley Wolk	2,780	51.04%
	Archie D. Mc Phee	1,235	22.67%
	Joe Comella	1,025	18.82%
	Kirk Dulin	388	7.12%
2014, Seat 5	Milt Davies	3,363	60.49%
	Midge Thomas	2,175	39.12%



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It is our understanding, based on the memories of District staff, surnames, and general knowledge of the District (although we have not independently verified or confirmed against official or other records), that there were no Latino (or other minority) candidates in any of the election cycles dating back to 1992. Given that, it is not possible for us to conclude that there were candidates for the Fallbrook PUD Board of Directors who were members of a protected class who were preferred by voters in that protected class and who were not elected to the Fallbrook PUD Board of Directors.

The CVRA and the Public Utility District Act

The District's powers derive from state statute, including its authority to hold elections. Public Utilities Code section 15951 *et seq.* specifies the processes for the District's elections. The District is bound by these statutory provisions and may only change its election procedures to a "by-district" system if permitted to do so by the Legislature. For example, Public Utilities Code section 15961.5 permits a district that is wholly or partially within Placer County to elect its directors at large, by wards, or from wards upon adoption of a resolution or ordinance by its board, subject to the approval of the board of supervisors or as a part of a change of organization or reorganization conducted pursuant to Cortese-Knox-Hertzberg. Similarly, section 15975 provides for a similar process for directors of the Georgetown Divide Public Utilities District to be elected by wards. There is no such statutory authority for the Fallbrook Public Utility District to have an election by ward (by-district) in the Public Utilities Code.

Other public agencies are permitted to change their election system pursuant to authority granted to them by the State Constitution or state statute. For example, charter cities are permitted to change their election systems as elections are deemed a matter of local, rather than state concern, and charter cities have jurisdiction over all matters that are not of state concern. *See* Cal. Const. art. XI, § 3(a) (permitting charter cities), § 5(b) (charters may provide for the conduct of city elections). Similarly, general law cities (all other cities that are not charter cities) may implement district elections if they follow a statutory procedure requesting voter approval to change from an at-large to either a by-district or from-district election system. *See* Gov't Code § 34871.

Here, however, even if the District desires to change its election system, we are unaware of any specific statutory authority for the District to do so and have not been provided any authority thus far to the contrary. In addition, we do not believe that LAFCO has the independent authority, absent express statutory authority, to make that change.



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Conclusion

Thus, based on the best information available to the Fallbrook PUD, we have been unable to establish that racially polarized voting has occurred. We would be happy to review any additional information that may be available that may shed additional light on this issue. Please contact either of us if you would like to discuss this further or have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kara K. Ueda'.

Kara K. Ueda
Paula C. P. de Sousa
of BEST BEST & KRIEGER LLP

KKU:cp

cc: Michael Colantuono, LAFCO counsel
Brian Brady, FPUD General Manager
Robert James, FPUD General Counsel