

**BRUNICK, MCELHANEY & BECKETT**

PROFESSIONAL LAW CORPORATION

1839 COMMERCENTER WEST

POST OFFICE BOX 6425

SAN BERNARDINO, CALIFORNIA 92412

TELEPHONE: (909) 889-8301

FAX: (909) 388-1889

E-MAIL: [bbmb@bbmblaw.com](mailto:bbmb@bbmblaw.com)

215 CAJON STREET

P. O. BOX 1320

REDLANDS, CALIFORNIA 92373

TELEPHONE (909) 793-0818

RENE S. ABRAHAM  
STEVEN K. BECKETT  
WILLIAM J. BRUNICK  
RAYMOND F. DOLEN  
STEVEN M. KENNEDY  
LELAND P. MCELHANEY  
STEPHEN MILLER

OF COUNSEL

CHARLES A. PECKHAM

PLEASE REFER TO

October 5, 2005

**VIA OVERNIGHT DELIVERY**

State Water Resources Control Board  
Board Members      Arthur Baggett, Jr.  
                                 Richard Katz

Staff Attorney Barbara Leidigh  
Division of Water Rights  
1001 I Street, 14<sup>th</sup> Floor  
Sacramento, CA 95814

Re:    Request for Continuance of Hearing  
      Lake Arrowhead Community Services District Enforcement Hearing  
      Case and Desist Order No. 262.31-18  
      Administrative Civil Liability Complaint No. 262.5-40

Ladies and Gentlemen:

This office serves as General Counsel to the Mojave Water Agency ("MWA"). The purpose of this letter is to formally request a continuance of the hearing on the above-referenced matters currently scheduled to be conducted by the State Water Resources Control Board ("SWRCB") on November 8, 2005.

In this regard, on or about March 24, 2003, the Division of Water Rights ("Division") received separate complaints from Ted Heyck and the Arrowhead Lake Association ("ALA") alleging that the Lake Arrowhead Community Services District ("LACSD") does not possess any water rights to justify diversion of water stored at Lake Arrowhead. After conducting an independent investigation of these complaints, the Division transmitted an initial staff report to LACSD, ALA, and Mr Heyck on February 10, 2004. After receiving numerous comments on the initial staff report from Mr. Heyck and the joint submittal of additional evidence from LACSD and ALA, the Division released its findings on August 1, 2005.

Consequently, after nearly two and one-half years of investigation, the Division found, in part, as follows:

“LACSD’s diversion and use of water from Lake Arrowhead for municipal purposes, or any other purpose, is unauthorized and constitutes a trespass against the State of California. LACSD’s diversion and use may also be adversely impacting recreational interests at Lake Arrowhead and vested water right holders within the Mojave River watershed and groundwater basin.” (Cover letter from Victoria A. Whitney, Division Chief, to Marv Shaw, LACSD General Manager, and Eric L. Garner, LACSD Legal Counsel, dated August 1, 2005.)

Specifically, the memorandum containing the Division’s final recommendation stated in pertinent part as follows:

“Lake Arrowhead impounds tributaries to the Mojave River. The [SWRCB] has determined that no water is available for appropriation from the Mojave River System, which is included on the [SWRCB]’s Declaration of Fully Appropriated Stream Systems (FAS). (SWRCB Order WR 98-08, pp. 23, 43.) The basis for the [SWRCB]’s determination, in 1988, that the Mojave River System is fully appropriated was the fact that existing legitimate users of subsurface water in the Mojave River Basin already had overdrafted the basin by approximately 3,600 to 24,000 afa, and any additional appropriations from the river would further deplete the subsurface water in the basin. (SWRCB Decision 1619, pp. 12-13, 16 (1988).) According to the California Supreme Court, the Mojave River Basin went into overdraft after demand exceeded natural supply sometime in the mid-1950’s. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1234 [99 Cal.Rptr.2d 294, 300, [5 P.3d 853, 858].)

“Based on the foregoing, any increase in consumptive use of water from Lake Arrowhead above the level of consumptive use that existed before the Mojave River Basin became overdrafted sometime in the mid-1950’s probably further contributes to the depletion of subsurface water in the basin, to the injury of downstream users whose rights had vested prior to the increase in consumptive use.” (Memorandum from Charles A. Rich, Senior Water Resources Control Engineer, and Dana Heinrich, Staff Counsel, dated July 18, 2005, p. 8.)

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Further, the Division's Administrative Civil Liability ("ACL") Complaint against LACSD also alleges that "LACSD's annual diversions and use have adversely impacted the recreational interests of Lake Arrowhead property owners and may have adversely impacted downstream water right holders in the Mojave River watershed." (ACL Complaint, p. 2.) Consequently, Paragraph 7 of the Division's ACL Complaint states in part as follows:

"In addition, LACSD's diversions likely have resulted in injury to water right holders in the Mojave River watershed. In 1988, the [SWRCB] determined that the Mojave River was fully appropriated year-round due to the fact that the Mojave River Basin already had been overdrafted and any additional appropriations would further deplete the subsurface water in the basin. Similarly, LACSD's diversions likely have further contributed to the state of overdraft, thereby injuring downstream water right holders."

In light of the above findings by the Division concerning the impact of LACSD's diversions on the Mojave River watershed, MWA decided that it would become actively involved in the proceedings that the Division has initiated against LACSD. MWA is a public agency organized and operating pursuant to the Mojave Water Agency Law, California Water Code Appendix Section 97-1 et seq., with statutory authority over various water-related matters within the Mojave River watershed. Additionally, MWA serves as the Mojave Basin Area Watermaster pursuant to the Judgment entered in the water rights adjudication referenced and relied upon by the Division in its memorandum of July 18, 2005. (*City of Barstow v. Mojave Water Agency*, supra.)

Consequently, after the Division issued its ACL Complaint and draft Cease and Desist Order ("CDO") against LACSD on August 1, 2005, MWA filed a Request for Special Notice ("RSN") with the SWRCB on August 19, 2005, seeking special notice of any and documents filed and served in said proceedings. On September 19, 2005, this office received a letter from Lewis Moeller, Chief of the SWRCB Hearing Unit, dated September 12, 2005, which expressly stated as follows:

"The Hearings Unit will be coordinating the scheduling of this hearing and will issue a hearing notice which will contain the date and time of the hearing along with other information regarding the hearing. *You have been added to the mailing list and will be receiving all documents filed or served in the above-entitled proceedings.*" (Emphasis added.)

On September 19, 2005, the SWRCB issued a Notice of Public Hearing ("the Notice") on the Division's ACL Complaint and draft CDO against LACSD. *However, this office was not included on the mailing list for the Notice.* Nevertheless, this office did in fact belatedly obtain a copy of the Notice through the offices of MWA's engineer, Robert C. Wagner, and is submitting to

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the SWRCB concurrently herewith its Notice of Intent to Appear at the hearing scheduled pursuant to the Notice.

However, the Notice reflects a hearing date of November 8, 2005, and a deadline for the submittal of witness testimony, exhibits, and qualifications of October 18, 2005. This schedule gives MWA a period of only *two months* from the date of its RSN to prepare for a hearing on matters that took the Division *two and one-half years* to investigate. Further, MWA's only expert witness, Mr. Wagner, is currently in Paris, France, on a month-long honeymoon.

The Notice specifically states that the Division's draft CDO and ACL Complaint against LACSD allege that "LACSD's diversion and use may also be adversely impacting recreational interests at Lake Arrowhead and vested water right holders within the Mojave River watershed and groundwater basin." MWA believes that it is uniquely qualified to furnish the SWRCB with critical information concerning this issue and other related matters. However, a two-month period of time in which to assemble and present such relevant evidence with respect to issues that have taken the Division two and one-half years to investigate unnecessarily prejudices MWA's interests and constitutes a denial of MWA's right to reasonable notice, thereby operating to impair MWA's ability to meaningfully participate at the hearing before the SWRCB.

Therefore, MWA respectfully requests that the SWRCB continue the hearing on the Division's draft CDO and ACL Complaint against LACSD currently scheduled for November 8, 2005, for a period of at least sixty (60) days. Your consideration of this request is greatly appreciated.

Very truly yours,

BRUNICK, McELHANEY & BECKETT



Steven M. Kennedy

cc: Kirby Brill, MWA  
Robert C. Wagner, P.E.  
Eric L. Garner, Esq. (LACSD)  
Michael T. Fife, Esq. (ALA)  
Theodore Daly Heyck