

**Borrego Water District Board of Directors
Special Meeting Workshop
July 9, 2019 @ 9:00 a.m.
806 Palm Canyon Drive
Borrego Springs, CA 92004**

I. OPENING PROCEDURES

- A. Call to Order:
- B. Pledge of Allegiance
- C. Roll Call
- D. Approval of Agenda
- E. Comments from the Public & Requests for Future Agenda Items (may be limited to 3 min)
- F. Comments from Directors
- G. Correspondence Received from the Public – NONE RECEIVED
- H. Board Strategy for FY 2020

II. ITEMS FOR BOARD CONSIDERATION AND POSSIBLE ACTION

- A. Borrego Water District
 - 1. Discussion of Potential Negotiated Terms of a Court Stipulated Resolution of Borrego Springs Subbasin Critical Overdraft
- S Anderson, BWD Legal Counsel
- B. STATUS UPDATE AND DISCUSSION OF
 - 1. Critical Overdraft Plan Development
 - 2. FY CIP Bond Spend Progress
 - 3. Proposition 218 Study Progress
 - 4. Water Quality Monitoring Plan Progress
 - 5. Other Current Projects Progress
 - 6. Review of District To Dos Table
 - 7. Urgent Issues Not Covered By Above Items

AGENDA: July 9, 2019

All Documents for public review on file with the District's secretary located at 806 Palm Canyon Drive, Borrego Springs CA 92004

Any public record provided to a majority of the Board of Directors less than 72 hours prior to the meeting, regarding any item on the open session portion of this agenda, is available for public inspection during normal business hours at the Office of the Board Secretary, located at 806 Palm Canyon Drive, Borrego Springs CA 92004.

The Borrego Springs Water District complies with the Americans with Disabilities Act. Persons with special needs should call Geoff Poole – Board Secretary at (760) 767 – 5806 at least 48 hours in advance of the start of this meeting, in order to enable the District to make reasonable arrangements to ensure accessibility.

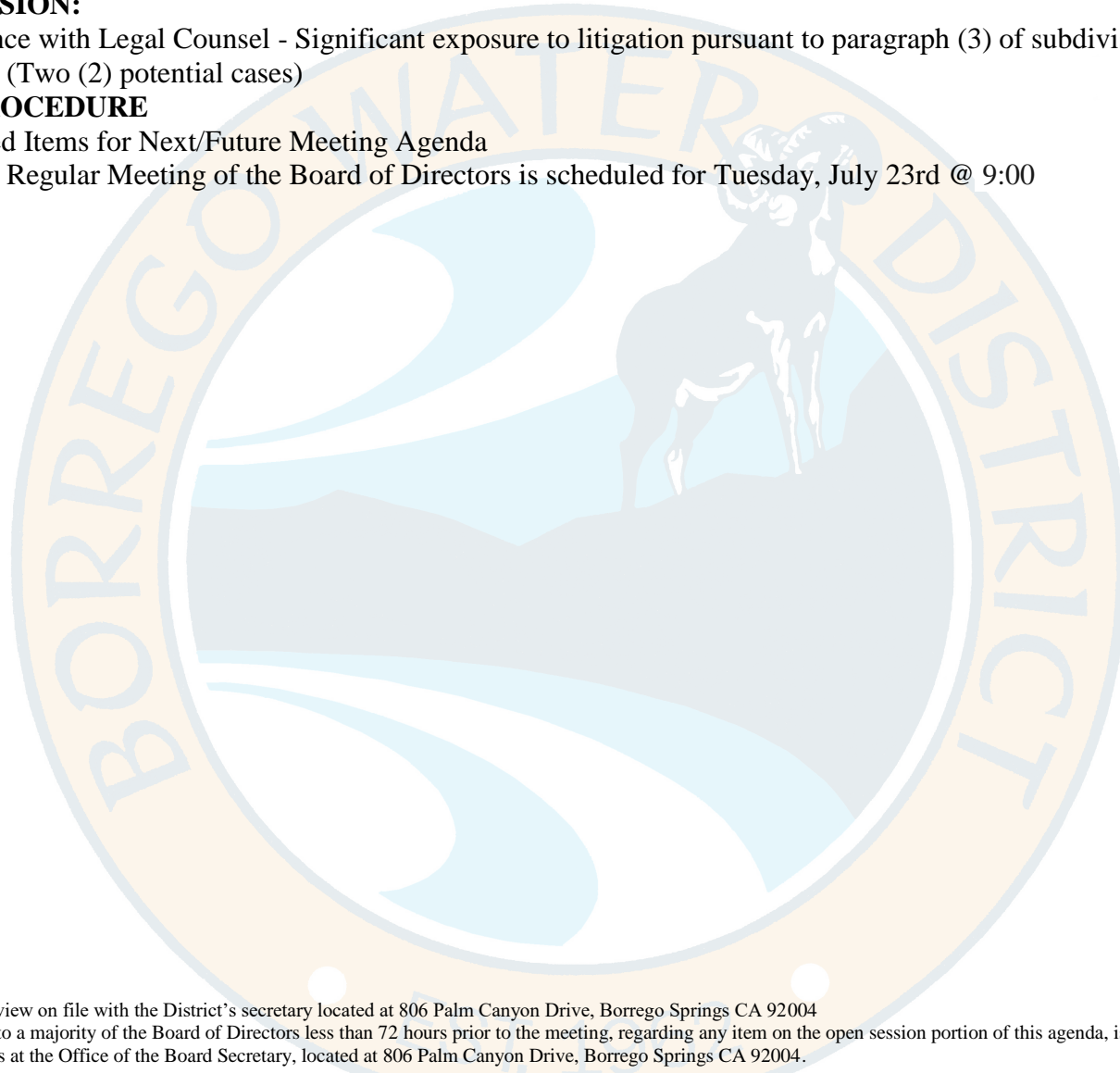
If you challenge any action of the Board of Directors in court, you may be limited to raising only those issues you or someone else raised at the public

III. CLOSED SESSION:

- A. Conference with Legal Counsel - Significant exposure to litigation pursuant to paragraph (3) of subdivision (d) of Section 54956.9: (Two (2) potential cases)

IV. CLOSING PROCEDURE

- A. Suggested Items for Next/Future Meeting Agenda
- B. The next Regular Meeting of the Board of Directors is scheduled for Tuesday, July 23rd @ 9:00



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BORREGO WATER DISTRICT

BOARD OF DIRECTORS MEETING – JULY 9, 2019

AGENDA ITEM II.A.1

July 5, 2019

TO: Board of Directors, Borrego Water District

FROM: Geoff Poole, GM and Steve Anderson, Legal Counsel

SUBJECT: Potential Terms of a Negotiated Stipulation among Pumpers to Resolve Borrego Springs Subbasin Water Rights and Critical Overdraft Issues

RECOMMENDED ACTION:

Receive Update; and Potentially Provide Agreement in Principle to proposed terms

ITEM EXPLANATION:

BWD has negotiated with agricultural and resort community interests about the potential terms of a “friendly” adjudication of water rights and related issues in the Borrego Springs Subbasin. Background information about water rights law and the advantages of a friendly adjudication as compared with other potential outcomes are addressed in the first presentation, attached. That presentation is a somewhat modified version of a presentation shared at a 2017 Town Hall meeting as well as information on the available alternate paths available in this situation.

The second presentation attached to this report shares the tentative terms of a proposed stipulated judgment. If ultimately approved by the BWD Board of Directors and the individual pumpers in the Subbasin, the terms would be incorporated into a complaint and other legal documents submitted to the Superior Court and to the Department of Water Resources for approval. The stipulated judgment—including a final version of the groundwater sustainability plan for the Subbasin serving as the judgment’s “Physical Solution”—would be the foundation for Subbasin management going forward.

Per standard adjudication procedures, the final approved judgment would provide for the formation of a Watermaster, as an arm of the Superior Court, with five appointed board members charged with administering the Judgment's terms. A Superior Court Judge would have continuing jurisdiction over the Judgment and Watermaster, and the authority to rule on disputes not resolved locally.

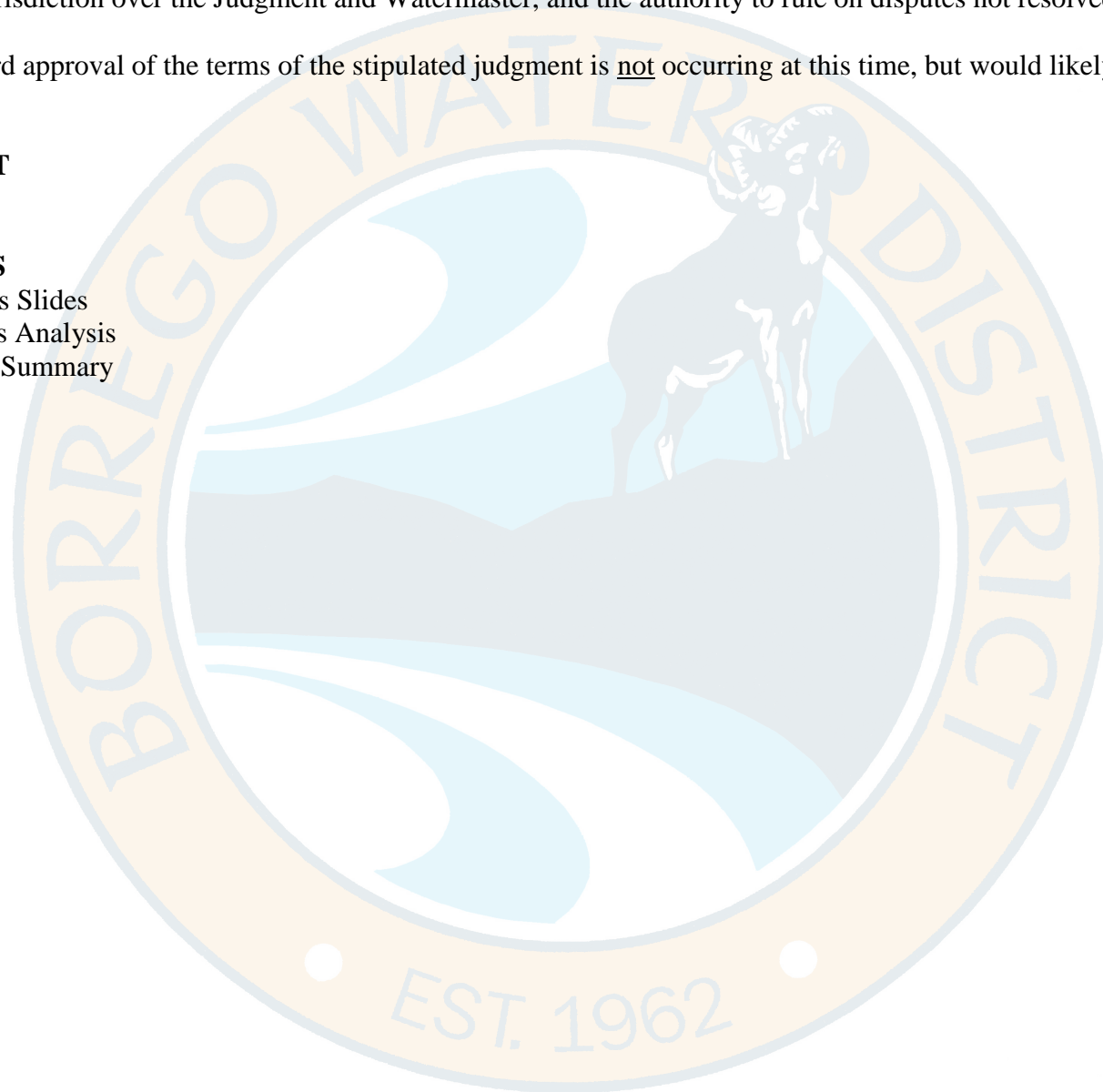
Formal BWD Board approval of the terms of the stipulated judgment is not occurring at this time, but would likely occur in September or October 2019.

FISCAL IMPACT

TBD

ATTACHMENTS

1. Legal Issues Slides
2. Alternatives Analysis
3. Stipulation Summary



ATTACHMENT #1

Water Rights / SGMA / Adjudication Issues

BORREGO WATER DISTRICT

July 2019

California Water Law

- California water law has been developed by the Legislature and courts since the State was established in 1850.
- For more than 160 years, the law has largely treated groundwater rights as real property.
- Over time, the law has begun to move toward treating groundwater as a public resource that should be more fairly shared. But, in large part, the courts still treat water rights as real property belonging to those with highest “priority” under law.

How are priorities established?

Background: SGMA v. Adjudication

Under SGMA, a GSA cannot determine water rights or modify the use or priority water rights. Thus, while SGMA compels avoiding undesirable results, water rights priorities cannot be disregarded by the GSA.

- An adjudication is a court procedure to establish each party's exact water rights.
- Water rights can be established by stipulation (agreement) or in a contested court proceeding.
- Parties can voluntarily agree to modify water rights priorities.



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SGMA v. Adjudication

SGMA and GSP adoption is thus an administrative process. As long as a GSP is adopted, SGMA gives a GSA flexibility in how to manage the basin using a broad suite powers.

- However, courts are the ultimate arbiters of water rights. SGMA expressly did not change this fact.
- And, as reflected in adjudications over the last 75 years, once a court exercises jurisdiction over groundwater rights, the judge also generally controls related issues, like rampdown, carryover, etc.



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SGMA v. Adjudication

At the same time, SGMA did direct courts to manage adjudication lawsuits “in a manner that minimizes interference with the timely completion and implementation of a [GSP], . . . and is consistent with the attainment of sustainable groundwater management within the timeframes of SGMA.” (Water Code 10737.2)

- Thus, courts are bound to ensure that sustainable groundwater management will occur.



How are priorities established? Background on Groundwater Rights

- Overlying – associated with land ownership and the use of water on that land (farmers, rec owners)
- Appropriative – takes water off the land or the right of public agency/utility to pump water to supply its customers (BWD)
- Prescriptive – water rights obtained by “adverse” use (at least 5 consecutive years)
- Reasonable and beneficial use requirements of the California Constitution, public trust doctrine apply to all groundwater rights (no wasting water)

Overview: How are priorities established?

Overlying rights are generally paramount to those of appropriators.

- But, the reverse is true if the appropriator has established prescriptive rights against overlying users.



Courts Struggle with the Need to Protect Landowners' Property (Water) Rights vs. Protecting Water for Human Consumption

- To date, courts have protected local water district groundwater rights by applying prescription.

- Examples of two of the seminal cases in California groundwater law:

- *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 (Upper Los Angeles River Area Basins).
- *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (Mojave Groundwater Basin)



So, how are water rights prioritized?

San Fernando (1975)

Water Rights Priorities Described

Landowners' overlying rights may be "prescribed" by public agencies who pump without landowners' permission for 5 years or more. But, landowners can protect their pumping rights through "self help" (by continuing to pump during the prescriptive period).

- This law of prescription is the primary reason the draft GSP awards BPA's to all pumpers, including BWD, and not just to landowners.
- The reason 2010-2015 is the BPA base period is because it immediately precedes SGMA. (Pumping after 2015 does not count for prescription claims, per SGMA).

So, how are priorities established?

Mojave Decision

- In 2000, the California Supreme Court reviewed the adjudication of the Mojave groundwater basin.
- Many public agencies, water attorneys and others urged the Supreme Court to allow trial courts to allocate water in a more equitable manner, and not just on priorities, which can favor overlying property owners and those that started pumping the earliest.
- Surprisingly, the Supreme Court reaffirmed in a unanimous decision that priorities must be followed, including overlying rights and prescription.

Mojave Decision (2000)

Water Rights Priorities

- (1) “Water right priority has long been the central principle in California water law. The corollary of this rule is that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use.” 23 Cal. 4th at 1243.
- (2) “Case law simply does not support applying an equitable apportionment to water use claims unless all claimants have correlative [overlying] rights. . . . Otherwise, cases . . . require that courts making water allocations adequately consider and reflect the priority of water rights in the basin.” (pp.1247-48).

At the same time, the Supreme Court did give some room to trial courts to protect all uses:

Mojave Decision (2000) cont.

Courts' Equitable Powers

“If Californians expect to harmonize water shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin.” 23 Cal.4th 1224, 1249, fn. 13.

What about Human Right to Water and other laws that favor domestic use?

Under the Water Code, domestic use is the “highest use of water” and irrigation is next.

- The Water Code was recently amended to include a “human right to water”. But, HRW is limited to water needed for consumption, cooking, and sanitary uses.
- HRW is based upon current customers only, not new development.
- In Borrego, this is likely to mean something less than 400 acre feet

- - However, no court has ever considered whether these statutes alter the traditional priority scheme
- And, the Legislature kept the HRW language vague (probably to avoid an outcry from farmers and claims of “taking water rights without just compensation”)



Fair Allocation: So, where are we?

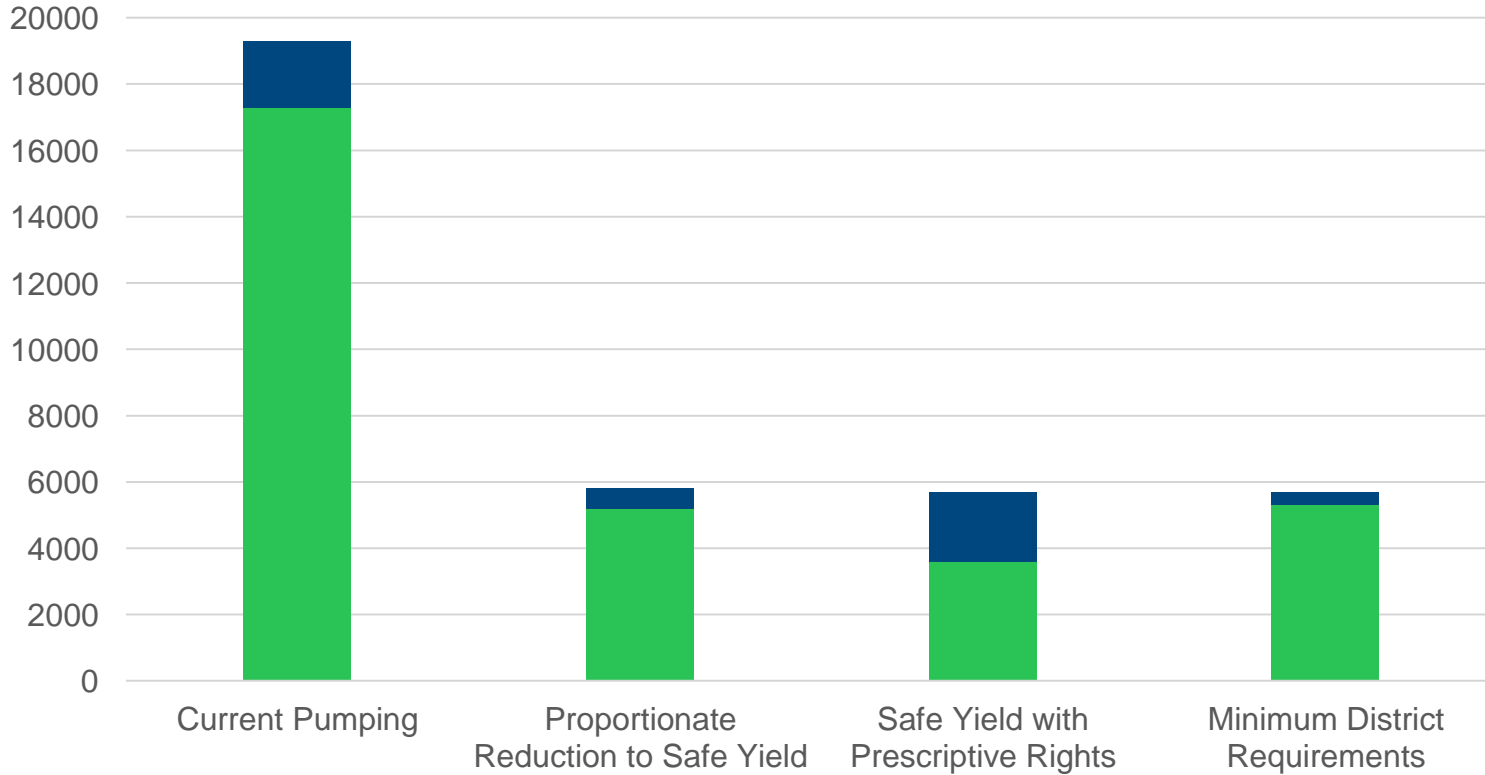
- If left to the courts, water rights to be granted to each pumper and how reductions are shared will be uncertain (until case ends and \$2 to \$4 million or more is spent by BWD).
- Court would need to make new law on HRW.
- Court might give BWD nothing or might give 400 acre feet for HRW; it is unknown.
- Court could legitimately view 1,700 afy as beyond that needed for consumption, cooking and sanitary purposes by current BWD customers. (For example, outdoor irrigation by BWD customers likely not HRW).
- Per *Mojave* water rights priority remains “the central principle in California water law.”
- On the other hand, no court has ever prevented a municipal water system from pumping water for domestic uses because of the overlying right priority.

Rampdowns

- In nearly all adjudications to date (contested or stipulation), base water rights (e.g., BPA) are ramped down on an equivalent basis for all sectors
- BWD is expected to receive a BPA higher than 2,000 afy
- Even under an 80% rampdown, BWD would still have at least 400 afa, which is the same as HRW, by 2040. So, court could say BWD customers HRW use will already be protected. - Plus, HRW has never been litigated.
- Very difficult proposition to “roll the dice”, spend \$4 million or more on litigation, with the hope a judge might give BWD more than 2,000 af (and 400 af HRW).



Pumping Scenarios – Are the middle bars both possible results?



Economics of Groundwater Management:

Stipulation and Cooperation or Adjudication

- BWD is currently negotiating with the overlyers regarding a potential stipulated judgment.
- The negotiations are confidential. The overlying pumpers would not participate without a confidentiality agreement.
- BWD will reveal the major provisions to the public very shortly, and hopefully next week.
- Even if not every customer agrees, one reasonable approach is for BWD to spend its public funds purchasing water rights to meet any BWD shortfall rather than on risky litigation.

New Adjudication Law

- In 2015, the California Legislature modified the law regarding how comprehensive water rights adjudications are processed.
- “Comprehensive” means that the water rights of all landowners in a basin are determined.
- Under the new law, if:
 - o more than 50% of the pumpers in a basin who
 - o pump at least 75% of the water in the basin in the 5 years before the lawsuit is filed,
 - o Agree to a proposed stipulated judgment, then those pumpers can “cram down” the judgment on other pumpers who refuse to sign it.

New Adjudication Law

- In general, the hold outs can stop the stipulated judgment from being approved by the court only if it:
- “Substantially violates” the water rights of the hold outs,
- Is inconsistent with the reasonable and beneficial use requirements of the California Constitution,
- Is inconsistent with the water rights priorities of the non-stipulating parties, or
- Treats objecting parties differently than non-stipulating parties



Questions?

ATTACHMENT 2

20-YEAR RISK ADJUSTED CAPITAL NEEDS IMPACTS OF PATH CHOSEN

DISTRICT COSTS and EXPENSES (in millions \$):
 GSA vs. STIPULATION vs. ADVERSARIAL ADJUDICATION PATH

COST/EXPENSE ITEM	GSA	STIPULATION	ADVERSARIAL ADJUDICATION
CIP COSTS	20	20	20
GSP PUMPING FEE EXPENSE	7.5	3	7.5
LEGAL EXPENSE	0.5	0.9	4.5
WATER RIGHTS COSTS	6.8	6.8	6.8
TECHNICAL EXPENSE	<u>0.3</u>	<u>0.7</u>	<u>0.8</u>
20-YEAR TOTAL	35.1	31.4	39.6

CONSIDERATIONS WHEN THE BEST ONE CAN DO IS TO AVOID THE WORST

- None of the paths avoid litigation but the anticipated legal costs are materially different
 - None of the paths likely result in materially less water purchase costs
- Draft GSP lacks governance, enforcement, equity, SDAC considerations and is expensive to implement
- Adversarial adjudication is most expensive for District and its ratepayers
- Stipulation adds governance and enforcement that GSA path presently lacks unless SWRCB takes over subbasin



ATTACHMENT 3

**OVERVIEW OF TERMS OF A POTENTIAL
NEGOTIATED SOLUTION REGARDING WATER
RIGHTS AND MANAGEMENT OF THE
BORREGO SPRINGS SUBBASIN**

July 9, 2019

Accelerated Rampdown

- 50% Rampdown from current pumping levels over the first 10 years
 - First 5% Rampdown begins 10/1/2020
 - From approx. 24,500 afy to approx. 12,250 afy by 2030
 - This Rampdown is earlier and faster than GSP (likely first GSP Rampdown in 2022 and less than 4% per year)
- Further equal Rampdowns to reach sustainable yield pumping by 2040

Metering

- All non-de minimis wells will be metered by March 31, 2020

Anza Borrego Desert State Park Wells

- Will receive a fixed Pumping Allocation to cover current and future uses, with no Rampdown

BWD Allocation

- $2,222 + 359$ in water credits = 2,581 af in total BWD water rights allocation

GSP Transitions to Physical Solution

- The Draft GSP will be converted into a Physical Solution consistent with the Stipulation, to be attached and incorporated into the Stipulation.

Governance

- Watermaster Board with Superior Court oversight
- Open, Brown Act Board meetings
- 5 Member Board
 - BWD Representative
 - Community Representative
 - County Representative
 - Agriculture Representative
 - Recreation Representative
- WM will have independent staff

Environmental Working Group

- Committee of scientific experts will be established to advise WM on GDE's and other matters
- Working with State Park and others on possible strategies to address GDE.

Technical Advisory Committee

- Engineers and hydrogeologists, etc. will advise WM on technical issues
- Any party to the Stipulation may appoint reps to TAC
- Watermaster will make ultimate technical decisions subject to Court oversight
- Court approval needed on some technical issues

Judgment Implementation Costs

- Borne by all pumpers based upon actual pumping, not BWD-alone
- Watermaster will collect assessments
- Court enforcement if assessments not timely paid

Anti-Speculation

- Speculation in water/water rights by outside interests will be significantly constrained through land ownership and other requirements

Water Transfers / Fallowing

- Water transfers allowed and encouraged, subject to crop/tree removal, mulching and other fallowing standards when land taken out of production
- Permanent water transfers subject to WM oversight and financial deposit to cover fallowing costs should transferring parties fail to properly and timely fallow