

**Borrego Water District Board of Directors  
Special Meeting  
January 7, 2020 @ 8:30 AM  
806 Palm Canyon Drive  
Borrego Springs, CA 92004**

**I. CLOSED SESSION: STARTING NOT BEFORE 8:30 AM**

- A. **Anticipated Litigation:** Conference with Legal Counsel - Significant exposure to litigation pursuant to paragraph (3) of subdivision (d) of Section 54956.9: (One (1) potential case)

**BWD SPECIAL BOARD MEETING: STARTING NOT BEFORE 9:00 AM**

**II. 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

**III. ITEMS FOR BOARD CONSIDERATION AND POSSIBLE ACTION**

- A. Review of Public Comment and Responses on Draft Water Rights Judgment and Associated Documents – Core Team
- B. Resolution No 2020-01-01 Of The Board Of Directors Of Borrego Water District Authorizing Board President To Execute Settlement Agreement; Authorizing Legal Counsel To File Adjudication Action; Authorizing Staff To Submit A Groundwater Sustainability Plan Alternative To The California Department Of Water Resources; And Authorizing Staff To File Notice Of Exemption – S Anderson
- C. Schedule for Nominating and Selecting Water Master Board Community and/or BWD Representatives – Core Team
- D. Cancellation of Borrego Springs Sub Basin Groundwater Sustainability Plan Public Hearing – S Anderson

AGENDA: January 7, 2020

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 hearing, or in written correspondence delivered to the Board of Directors (c/o the Board Secretary) at, or prior to, the public hearing.

**IV. CLOSING PROCEDURE**

The next scheduled Board Meeting is January 14, 2020 – 9 AM @ 806 Palm Canyon Drive, Borrego Springs CA 92004

BORREGO WATER DISTRICT  
BOARD OF DIRECTORS MEETING  
JANUARY 7, 2020  
AGENDA ITEM III.A

January 3, 2020

TO: Board of Directors  
FROM: Geoffrey Poole, General Manager  
SUBJECT: Summary of Comments and Responses - Core Team

**RECOMMENDED ACTION:**

Receive All Comment Letters Received during 30-day Stipulation Public Review and Proposed BWD Responses

**ITEM EXPLANATION:**

At the end of the 30-Day public review process of the proposed Stipulated Judgment, 13 comments were received and copies of each are attached. Comments received were one of two primary types: Question/Comment and Specific Change to Stipulation Documents. Within those two types, the topics varied widely including Governance, Following, etc. The BWD Core Team created a summary of the questions/comments and categorized them as either a Question/Comment or Specific Change to Stipulation Language and then grouped them by topic (attached).

A link to copies of all Comment Letters are on the BWD website home page.

**ATTACHMENT:**

1. Summary of Comment Letters and BWD Response

**NEXT STEPS**

Review documents, discuss, revise if needed

**FISCAL IMPACT**

N/A

**Borrego Water District**  
**Response to Public Comment**  
**Stipulated Judgment – Borrego Springs Sub Basin**  
**January 3, 2020**

**COMMENTS RECEIVED FROM**

Comment letters were received by BWD during the 30-day Stipulated Judgment review from the following:

<u>COMMENT #</u>	<u>AUTHOR</u>
#1 - Atty	Borrego Springs Unified School District Elementary School Well, James Markman
#2	Gary Haldeman, Borrego Resident
#3	Bob Manthei, Borrego Resident
#4	Becky Falk, Borrego Resident
#5	Lundberg Family Trust, Water Credit Holder
#6	Seldon Mc Kee, Borrego Resident
#7	Judy Haldeman, Borrego Resident
#8	County of San Diego
#9	Tubb Canyon Desert Conservancy
#10	Tubb Canyon Landowners Association
#11	Audubon Society
#12	California State Parks
#13	Clean Water Action

**Requested Changes to Stipulated Judgment**

**Water Rights/Legal Process**

1. #1: *The amount of water production requested to be non-reducible is the annual amount of 22-acre feet stated in the July 13, 2018 allocation letter provided to the School District by the San Diego County Planning & Development Services department.*

RESPONSE: Judgment Revised Accordingly, see section III.D.(2).

2. #3: *All BWD Ratepayers will be indirectly obligated to pay much more for water service as a consequence of the BWD actions as Plaintiff leading to overwhelming and unsustainable cost. There is no provision in the proposal protecting the ratepayer from extended litigation as that litigation directly and indirectly govern the cost of water service afforded the ratepayer:*

RESPONSE: Comment noted. BWD is not anticipating “overwhelming cost” as part of this process. It is anticipated that the adjudication will result in a stipulated judgment without significant litigation.

3. *#3: Stipulated Judgment must include assurances that the individual ratepayer will be allowed to drill a De Minimus well in the future.*

RESPONSE: Well drilling permit issuance remains a function of the County of San Diego. Also, de minimis pumpers are exempt from most provisions of the Stipulated Judgment, see section III.H.

4. *#13: We propose that disadvantaged community water systems like Borrego Water District be exempt from mandatory reductions under the stipulated judgement, and instead be allowed to comply with laws and regulations that regulate residential water use, as they may be updated.... We recommend that minimum usage be set at a level based on actual human needs and incorporating current best practices and available technology for water conservation.*

RESPONSE: Comment Acknowledged:

5. *Include De Minimus pumpers in Stipulated Judgment requirements*

RESPONSE: Comment Acknowledged: The Code of Civil Procedure provides the court with authority to make de minimis pumpers fully or partially subject to the judgment, or exempt, in the Court’s discretion, and absent a finding that the de minimis pumpers are causing significant harm, there is no basis for subjecting them to the Stipulated Judgment requirements. (See Water Code, § 10730(a); CCP § 833(d).)

## **Governance**

1. *#2: Community WM Board Member should be selected by the Community*
2. *#4.2: Community WM Board Member should be selected by Nominating Committee*
3. *#6: Community WM Board Member should be selected by BWD*
4. *#9: Community WM Board Member should be selected by Nominating Committee*
5. *#10: De Minimus Pumpers should have a seat on WM Board*
6. *#11: Lack of Environmental representation on Board*
7. *#13: WM Board should consist of 7 members without super majority*
8. *#13: WM Board should not select the Community Member*

RESPONSE: The Stipulated Judgment has been revised accordingly to take into account concerns of community selection of Community Watermaster Board member. The BWD Board will make

the selection of the WM Board Community after local organizations provide a slate of candidates and a public forum is held by the BWD.

9. #4.2: *It is important for the Community Member and Alternate Member to be appointed/selected and seated for the first meeting of the Watermaster (WM) Board.*

RESPONSE: WM Board Community Member will be seated as soon as practical, estimated to be Feb/Mar 2020

10. #4 and #6: *Community Member should have a budget of \$10,000-\$20,000/yr & staff and/or support equivalent to the staff and support the other members will have.*

RESPONSE: Comment noted. The community member will be given authorization in the Judgment to appeal Watermaster decisions, see section VII.A.1. However, we are not aware of any judgments that compel Watermaster funds to be collected and directed to support any particular sector. Each party is responsible for their own costs.

11. 4.2: *There should be a mechanism for the Watermaster Board Membership or weight of votes to shift over time to accommodate major changes in the percentages of water rights held by the participating sectors.*

RESPONSE: Comment Acknowledged: While the court has authority to hear such a request and reformulate the WM Board in the future, if the court deemed appropriate, see Section VII.A., see section IV.

12. #8: *Include language to include an alternative in the event the County Board of Supervisors declines to participate on the WM Board.*

RESPONSE: Comment Acknowledged: BWD feels County involvement on the WM Board is essential.

13. #11: *WM Board should include a permanent Environmental Representative or a rotation of appointees representing the interests outside the influence of the other members already sitting on the Board.*

RESPONSE: Comment Acknowledged: Audubon Society, and others, could get involved in the existing nomination process by encouraging candidates with the desired knowledge and experience to apply.

14. #11, #12 and #13: *The Environmental Working Groups (EWG) roles/duties should be elaborated*

RESPONSE: Comment Acknowledged: The Stipulation requires the formation of the EWG, and the BWD will ensure the WM Board creates the EWG to meet the environmental interests affected by the Basin.

15. #12: *Avoid the potential of allowing a minority of members to make WM Board decisions.*

RESPONSE: Stipulated Judgment revised accordingly to require at least 3 affirmative votes on all matters not requiring a Supermajority, see section IV.B.2.

## **Rampdown/BPA**

1. *#4.1: Eliminate Overpumping Provision: I would like to see an orderly decrease in water use as expected under the state sustainability law rather than an increased allowance for pumping in the first three years, because such increases encourage continued overpumping for three years followed by selling water rights before the overpumping needs to be made up within the first five years of the Plan by subsequent pumping of less water than allocated. This is a detrimental pattern for providing job transitions for residents.*

RESPONSE: Comment Acknowledged: Although a benefit from overpumping, job retention was not the motivator for creating the provision; the vast majority of Agricultural pumpers are currently unmetered and the 3 years provides an opportunity for them to first determine their current actual usage and then how to meet rampdown provisions. If a property owner were to sell land where Overpumping has occurred, the new owner would inherit the obligation and under pump in years 4 and 5 or pay the penalty.

2. *#8 Revisit Carryover provisions and consider limiting to the following year. Current proposal may not satisfy DWR requirement for sustainability in 20 years.*

RESPONSE: Comment Acknowledged: The TAC and Watermaster Board will evaluate this issue

3. *#8: De Minimis pumpers in SGMA for ALL users less than 2 afy and Stipulation defines as DOMESTIC, requesting change to SGMA definition of ALL.*

RESPONSE: The Judgment is consistent with SGMA in allowing 2 afy or less of pumping for domestic use to qualify as de minimis. The Judgment also specifies that public agencies pumping less than 2 afy for any use are considered de minimis

4. *#12: 20 afy allocation should not be impacted by future fee transfers and not include de minimus use from Horsecamp Park.*

RESPONSE: The Judgment is not drafted to identify State Park APN's, so the State Park allocation may be used on all State Park lands existing now or in the future. Because the Horsecamp Park is de minimis use already, its status will not change under the Judgment and use at the camp will remain recognized as de minimis.

## **Water Quality**

1. *4.1: Keeping our water quality high, which means providing for environmental reviews for any intrabasin water transfers and for additional pumping allowed, especially in our Central Management Area, as these could affect water quality.*

RESPONSE: BWD also places a high priority on water quality. WM, with input from TAC, may condition or restrict intrabasin transfers if necessary to protect the Basin, if scientifically merited, see section III.I.5.

2. *4.1: Close the data gap and expand the Water Quality Monitoring Program into the northern and eastern parts of the Central Management Area. That monitoring needs to happen now in order to have adequate data in two or three years to know if there is any impact from the Northern Management Area where water quality is impacted from agricultural use, on water in the Central Management Area that serves most of the town. This is especially important during the time we are entering that will see changing patterns of water pumping in the valley.*

**RESPONSE:** Comment Acknowledged: The stipulating parties/BPA holders have agreed to fund the continuation on all water quality sampling started by the GSP process. BWD will continue to sample its wells more often than required and pursue grants to expand the network. The Stipulation includes language requiring the TAC and WM to develop a Water Quality program within 24 months, see section VI.B. Any party can attend the public meetings and raise the applicable issues regarding the future water quality monitoring program. The combined efforts of GSP initiated testing (soon to be paid by pumpers) and ongoing BWD sampling (approx. 40 total) is a good start and additional sites are always desired. BWD will continue to pursue grants for as many as 10 re-purposed abandoned wells for monitoring. BWD is comfortable with the current sampling and plans to expand in the future.

3. *#4.3: What provisions are there for environmental assessments prior to any intrabasin transfers and for ensuring that pumping after water trading doesn't impact one area more than another, or create new problems? Will there be an anti-degradation analysis for water use prior to such trades and transfers?*

**RESPONSE:** BWD (for BWD-involved transfers), and WM, with input from the TAC, will have the flexibility to determine the extent of any additional science based reviews and limitations on future water transfers, as may be needed and/or required by law.

4. *#4.3: A provision to limit this transfer of water rights to parcel(s) in the same management area as the original parcel, unless environmental assessments and degradation analyses as mentioned in item #1 above are conducted prior to the transfer being approved?*

**RESPONSE:** The Judgment gives WM the authority, with input from the TAC, to so require if scientifically merited, see section III.I.5.

### **Fallowing Standards/Transfers**

1. *#4.3: Is there any water right being left with fallowed land that can be used for restoration at some point? If not, please consider doing this. The water demand of land fallowing is not considered. Exhibit 3 includes minimal requirements for permanent land fallowing that are inadequate to prevent negative impacts including blight. At minimum, sufficient water should remain with the land to ensure proper dust mitigation, including cover cropping and/or spraying. Additionally, these requirements are not applied to temporary transfers, even if those transfers span multiple years. Given the severe local climate, we fear that dust mitigation could be required even for*



*single-year transfers. We strongly recommend that these standards be made more protective of public health and applicable to both temporary and permanent transfers.*<sup>4</sup>

RESPONSE: Comment Acknowledged: The use of water on future fallowed land, or not, would be determined as part of each land transaction and BPA adjusted accordingly, see section III.J.

2. *#7: Land in the basin is very inexpensive – 20 acres could be found for \$20,000, which would make 100 AF of water very easy to acquire. If this is to be a deterrent to speculation, once acre for 5 AF of water is not good enough to inhibit speculation.*

RESPONSE: Comment Acknowledged. Speculation will be further discouraged by other provisions of the Judgment, including rampdown and assessment requirements.

3. *#8: Revise Anti Speculation Provision: add “or project applicant/developer (with consent from the property owner) should have the ability to purchase needed water rights*

RESPONSE: BWD believes this addition is unnecessary as under the Judgment developers can already work with the landowner to purchase BPA, attach the BPA to the land, and transfer the land and the BPA to the developer at the appropriate time. Also, allowing any entity claiming to be a developer to purchase BPA separate from land would defeat the purpose of the anti-speculation provision.

4. *#8 Add language stating a Fire Department burn permit and Smoke Management Plan approved by County APCD may be required for agricultural burning.*

RESPONSE: Comment noted. Nothing in the Judgment relieves any party or entity from obtaining all legally required permits.

### ***Miscellaneous***

1. *#11: There should be a full discussion presented in the final report on why there was an exemption of CEQA oversight and under what circumstances.*

RESPONSE: BWD will follow all required CEQA procedures. See accompanying BWD resolution and staff report. However, final approval of the Judgment rests with the Court and courts are not subject to CEQA. (State CEQA Guidelines § 15379; *see also Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 550-51 (West Coast Basin); *Calif. Am. Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 481-82 (Seaside Basin).)

2. *#12: Cost Recovery for State Parks for WM entry to conduct environmental or cultural resource review.*

RESPONSE: Comment noted. The State Parks can address this issue in any individual right of entry agreement it enters into with the Watermaster.

3. *#12: Water used for firefighting and other natural disasters should be exempted.*

RESPONSE: Judgment revised accordingly, see section III.A.

**Borrego Water District**  
**Further Response to Public Comment/Questions/Clarifications**  
**Stipulated Judgment – Borrego Springs Sub Basin**  
**January 3, 2020**

Comment letters were received by BWD from the following:

<u>COMMENT #</u>	<u>AUTHOR</u>
#1	Borrego Spring Unified School District Elementary School Well, James Markman -
	Attny
#2	Gary Haldeman, Borrego Resident
#3	Bob Manthei, Borrego Resident
#4	Becky Falk, Borrego Resident
#5	Lundberg Family Trust, Water Credit Holder
#6	Seldon Mc Kee, Borrego Resident
#7	Judy Haldeman, Borrego Resident
#8	County of San Diego
#9	Tubb Canyon Desert Conservancy
#10	Tubb Canyon Landowners Association
#11	Audubon Society
#12	California State Parks
#13	Clean Water Action

**Water Rights/Legal Process**

1. #3: *There is no clear indication that De Minimus Water Rights would be protected from confiscation. –*

RESPONSE: De Minimus pumpers are largely exempt from SGMA and the Stipulated Judgment, as finally determined by the court approval.

2. #3: *Legal process of service alone to all affected parties will represent formidable expense to BWD.*

RESPONSE: Cost of Service is being shared by all pumpers based on their proportional BPA (BWD @ 10% +/-) or an estimated \$10,000 or less for BWD’s share.

3. #3: *WM and Staff operating without Court approval is another cost for BWD Ratepayers.*

RESPONSE: Except for the first several months of 2020, there is no time in which the WM will be running “without Court approval”. WM start up and ongoing expenses will be shared by all pumpers based on their proportional BPA.

4. #3: *Economic and social Institutional forces at work will solve the problem naturally.*

RESPONSE: In 1982 when USGS determined the Subbasin was in serious overdraft, this was the argument – “market forces would solve the overdraft by the year 2000.” Yet, between 1982 and 2010 the overdraft more than doubled. In BWD’s view, SGMA has been the driver toward resolving overdraft, in contrast to other forces.

1. #3: *Water policy should be defined and implemented by State and Federal agencies.*

RESPONSE: Comment noted. SGMA requires local action to address the Basin’s overdraft either in the form of a GSP or a court judgment that is approved by the California Department of Resources and establishes functionally equivalent management.

2. #11 *CEQA related review of implementation of the Physical Solution has been removed from the Stipulated Judgment. There should be a full discussion presented in the final report on why there was an exemption of CEQA oversight and under what circumstances.*

RESPONSE: See above response.

## **Governance**

1. #4.2: *There are regular meetings with 72 hours notice for agendas and Special meetings with 24 hours notice, and also the possibility of an Adjournment to a new location and time for a meeting with the notice put on the door of the meeting place within 24 hours of the Adjournment decision.*

RESPONSE: These processes are described in and consistent with the Brown Act.

2. #4.2: *Is the Community Watermaster Board Member a "Party" in that he or she can appeal to a court, request mediation for an unresolved issue, and/or hire a specialist?*

RESPONSE: The Judgment has been revised to make explicit that the Community Representative can appeal any Watermaster decisions, whether or not the representative is a Basin landowner.

3. #11: *The WM Board Term is not identified.*

RESPONSE: The term of each WM member is indefinite, which is common in adjudicated basins, with the ability of the appointing entities to change their representatives.

4. #11: *More information is desired on the Environmental Group that will advise the Watermaster on Groundwater Dependent Ecosystems. What will the procedures be to form this group and how will their consultation be properly addressed during construction of policy? These should be clearly identified in the final prepared documents because this group is in important oversight and communication piece of the full plan.*

RESPONSE: BWD is comfortable leaving this decision up to the Watermaster Board to decide, after receiving community input.

5. #13: *Watermaster Board does not function as a “local agency” under Government Code section 54951, and that compliance with the Brown Act is thus determined by the Court. A public agency for the purposes of the Brown Act is one “be created by statute or Constitution.” (McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 Cal.App.4th 354, 359; Gov. Code § 54951.) Watermasters are created by statute, even when the specific water rights are adjudicated by a court. (Wat. Code §§ 4026, 4027.) Therefore, the Watermaster board is a public agency for the purposes of the Brown Act.*

RESPONSE: The “watermaster service areas” referenced in Water Code sections 4026 and 4027 are unrelated to a watermaster created by a court via a water rights judgment. Here, the watermaster is created by the Judgment and the Court, not by statute or Constitution.

## **Rampdown/BPA**

### Comments/Questions & Response when Necessary:

1. #5: *Requesting Confirmation of 294 AG-1 Water Credits for Parcel 1 of Viking Ranch:*

RESPONSE: BWD agrees with the understanding of Water Credit issuance for this parcel. Such water credits will be converted to BPA under the Judgment, unless other arrangements are made by the water credit holder.

2. #13: *The environmental water demand of the basin is not identified or provided for in the BPAs.*

RESPONSE: BPAs are assigned to pumpers with water rights. But the WM and EWG will further research and develop appropriate programs to address environmental concerns as is necessary.

## **Miscellaneous**

1. #4.1: *I have been disheartened that the public process for discussing and shaping a water plan for Borrego in compliance with state law was abandoned in disdain of the kind of public participation that had begun in 2017. By early 2019, private talks with representatives of farmers and golf courses about their “water rights” were happening and they quickly ended up becoming private talks about all potentially controversial parts of a water plan. Plans for water reductions, water trading, fallowing, conservation, water quality and transfers of water within the basin (intrabasin transfers) were now the subject of private negotiations instead of being publicly discussed and decided.*

RESPONSE: Water rights judgments are typically negotiated among water rights holders. In this case, BWD provided for an extended public review of the proposed Judgment and associated documents. Changes have been negotiated to the documents as a result of these comments, which have been very helpful. The Groundwater Management Plan (formerly the GSP) remains the foundation for the Subbasin physical solution that will be implemented as part of the Judgment.

2. #4.1: *BWD and the County of San Diego formed a partnership in 2017 to address our critically over drafted basin and to hold a public process to create a Groundwater Sustainability Plan*

*for our water use. They received funds from the Department of Water Resources (DWR) to help with that public process. But when the farmers decided not to cooperate publicly, not to release data on their water use publicly, and in general not to agree to discuss issues publicly, that process was abandoned, and those of us volunteering our time and concern on the committee formed to create our water plan through a public process, were left with no decisions to discuss or make. Instead we became witnesses to presentations about hydrogeology and information about our basin setting—all important as documentation for and from experts about our basin—but not the same as the decision-making process we thought we had volunteered to join.*

RESPONSE: See above response. Basin Hydrology and Project and Management actions developed as part of the GSP process were retained and included into the Stipulation. BWD negotiators made retaining the work done by BWD/County, Advisory Committee and Consultants within the GMP a top priority.

3. *#4.2: BWD says it represents members of the community who buy water from it, but BWD has shut out community input during this process.*

RESPONSE: Comment Received: By definition, the primary purpose of the 30-day Public Review Period was to solicit input during the process. BWD determined, based on advice of Counsel and common practice, the negotiations process had to be confidential with non-disclosures binding the parties. In this and other adjudication negotiations “including the public” can hamper resolution as private parties generally do not feel free to share information publicly. BWD provided periodic updates once the components of the possible judgment documents were being formalized during the negotiations. In addition, BWD required a 30-day public review process before making any decisions with the full intent to renegotiate terms, as deemed appropriate by BWD.

4. *#8: The County is pleased that the GSP was used as the foundation for the Stipulation in substantially similar form.*

RESPONSE: Comment Acknowledged

5. *#8: The County requesting advanced notice and opportunity to review any proposed future changes to BWD Developers Policy.*

RESPONSE: BWD will notify the County as needed in the future.

BORREGO WATER DISTRICT

BOARD OF DIRECTORS MEETING – JANUARY 7, 2020

AGENDA ITEM III.B

TO: Board of Directors, Borrego Water District

FROM: Steve Anderson, Legal Counsel

SUBJECT: Settlement Agreement to Resolve Borrego Springs Subbasin Water Rights and Critical Overdraft Issues; Initiation of Adjudication Action; Submission of GSP Alternative to Department of Water Resources (DWR); Posting of CEQA Notice of Exemption

**RECOMMENDED ACTIONS:**

1. Authorize Board President, or designee, to execute Settlement Agreement
2. Authorize legal counsel to file Adjudication Action pursuant to the Settlement Agreement
3. Authorize staff to submit to DWR an alternative to a groundwater sustainability plan
4. Direct staff to file a Notice of Exemption with the clerk for the County of San Diego.

**ITEM EXPLANATION:**

The Sustainable Groundwater Management Act (SGMA) requires the Borrego Springs Subbasin (Basin) to be managed sustainably over the next twenty years and beyond. Because DWR has designated the Basin as critically overdrafted, there must be a groundwater sustainability plan (GSP), or alternative management plan, adopted and submitted to DWR by January 31, 2020.

SGMA does not allow for declarations or modifications of water rights, but management of the Basin, including necessary pumping reductions/rampdown, without a quantification and declaration of water rights may be difficult and/or lead to litigation. SGMA thus recognizes that legal actions to establish groundwater rights and manage basins, or “groundwater adjudications” may occur. These adjudications are governed by statutes enacted after SGMA and allow courts to enter judgments that manage groundwater basins sustainably. Further, SGMA allows that the management of a basin pursuant to a groundwater adjudication can serve as an alternative to a GSP, if DWR approves that management structure.

Accordingly, BWD has been negotiating with agricultural and resort community interests the potential terms of a “friendly” adjudication of water rights and management of the Basin. These negotiations have culminated in a proposed Settlement Agreement among BWD and other major pumpers and stakeholders in the Basin. The Settlement Agreement requires, among other things, that BWD file an Adjudication Action to manage the Basin and to submit as a GSP alternative the proposed Stipulated Judgment to be entered in the Adjudication Action for DWR to review for SGMA compliance.

1. Settlement Agreement

BWD proposes to enter into a Settlement Agreement with the significant groundwater pumpers in the Basin to resolve disputes regarding their respective groundwater rights. The Settlement Agreement provides terms for the parties to stipulate to a process that will result in a Stipulated Judgment and Physical Solution, including a Groundwater Management Plan (GMP), that will be entered in a

comprehensive groundwater adjudication to be filed by BWD (Adjudication Action). The Stipulated Judgment and Physical Solution in the Adjudication Action will comprehensively determine and adjudicate all rights to pump groundwater from and store groundwater in the Basin and will provide for the sustainable management of the Basin in compliance with SGMA and the California Constitution. The Physical Solution and GMP will achieve sustainable Basin management through water trading, water conservation, pumping reductions, water quality optimization, and intra-basin water transfers.

The Settlement Agreement provides that BWD intends to file the Adjudication Action by January 24, 2020 and that the parties will share certain costs of the Adjudication Action, including reimbursement to BWD for its preparation of the GSP. The parties agree that they will accept BWD's service of the Adjudication Action complaint and other required pleadings and will file an answer. The parties also agree to be bound by, and to ask the Court for a preliminary injunction to establish, interim Basin management measures pending the entry of the Stipulated Judgment, including the formal establishment of an interim Watermaster to manage the Basin, installation of meters by all parties, continuation of water quality monitoring, and funding of Basin management measures.

Additionally, the Settlement Agreement requires BWD to submit the Stipulated Judgment and Physical Solution to DWR for a determination that it complies with SGMA as an alternative to a GSP to manage the Basin. BWD will submit the GSP alternative before January 31, 2020. Once DWR determines that the Stipulated Judgment can serve as a GSP alternative in compliance with SGMA, the parties will sign a stipulation and ask the court to enter the Stipulated Judgment in the Adjudication Action.

Collectively, these actions are intended to resolve the Adjudication Action, establish groundwater rights in the Basin, and sustainably manage the Basin in perpetuity. However, it is possible that (1) non-parties to the Settlement Agreement may object to the Stipulated Judgment and Physical Solution; (2) DWR may seek to change the Stipulated Judgment; and/or (3) the court may not enter the Stipulated Judgment that the parties have agreed to. Any of these possibilities could lead to more protracted litigation regarding groundwater rights in the Basin and how to sustainably manage the Basin.

## 2. Adjudication Action

Because SGMA cannot establish or modify water rights, a court action (Adjudication Action) is necessary to set groundwater rights and to establish a physical solution to manage the Basin pursuant to the Settlement Agreement. SGMA and the groundwater adjudication statutes under the California Code of Civil Procedure<sup>1</sup> both establish procedures to litigate groundwater rights and basin management. For example, SGMA recognizes that adjudication actions will occur, but instructs they should not interfere with the development of sustainable groundwater management.<sup>2</sup> Furthermore, a court shall only approve a judgment in an adjudication action if it "finds that the judgment will not substantially impair the ability . . . to achieve sustainable groundwater management."<sup>3</sup> Similarly, the groundwater adjudication statutes provide that its proceedings must be consistent with SGMA. Groundwater adjudications must be conducted "in a manner that is consistent with the achievement of groundwater sustainability within the timeframes" of SGMA.<sup>4</sup>

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<sup>1</sup> Cal. Water Code §§ 10737-10737.8; Cal. Civ. Proc. Code §§ 830-852.

<sup>2</sup> Cal. Water Code § 10737.2.

<sup>3</sup> *Id.* at § 10737.8.

<sup>4</sup> Cal. Civ. Proc. Code § 830(b)(4).

While the recently enacted groundwater adjudication statutes seek to streamline the process, groundwater adjudications are typically long and expensive. However, the parties to the Settlement Agreement have negotiated the terms of a “friendly” Adjudication Action that seeks to avoid a long court battle over groundwater rights in the Basin and have already negotiated the terms of a Stipulated Judgment, Physical Solution, and GMP, which typically take years or decades to develop and establish. By the Stipulated Judgment, Physical Solution, and GMP to be entered in the Adjudication Action, the parties have already agreed to their respective groundwater rights and have agreed to measures necessary to reduce pumping from the Basin and to manage it sustainably in a manner that protects water rights and the Basin in compliance with SGMA and the California Constitution.

Additionally, the final judgment entered in the Adjudication Action will 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 would have continuing jurisdiction over the Judgment and Watermaster, and the authority to modify the Judgment as necessary and to rule on disputes not resolved locally.

There is no guarantee that the Superior Court will enter the Stipulated Judgment that the parties request. But, due to the limited resources of and varied interests in the Basin, and due to SGMA’s requirement that this critically overdrafted Basin be managed sustainably, litigation might otherwise occur. The proposed Adjudication Action and Stipulated Judgment seek to proactively manage this litigation risk. Accordingly, pursuant to the Settlement Agreement, BWD intends to file an Adjudication Action by January 24, 2020.

In addition, BWD circulated the proposed stipulated judgment for public review. The public review comment period ended December 20, 2019. As a result of the comments received, a number of changes have been made to the proposed judgment, including that the community representative to the Watermaster Board will be selected by the BWD Board of Directors.

### 3. GSP Alternative

To comply with SGMA, BWD, along with the County of San Diego, formed the Borrego Valley Groundwater Sustainability Agency and developed a GSP to sustainability manage the Basin. The GSP was prepared and submitted for public review in compliance with SGMA but was never formally adopted, and the County withdrew from the Borrego Valley Groundwater Sustainability Agency effective December 2019. SGMA allows that basin management pursuant to an adjudication action can serve as alternative to a GSP, if DWR approves the alternative.

Accordingly, to comply with SGMA and pursuant to the Settlement Agreement, by January 31, 2020, BWD will submit the proposed Stipulated Judgment, including its attached GMP, to DWR for review and approval to serve as an alternative to a GSP. BWD will also file with DWR, as appropriate, a “Coordination Document” or “checklist” that explains how the GMP and other documents satisfy SGMA’s requirements to facilitate the DWR review process.

### 4. CEQA Analysis

In its capacity as lead agency, the Board of Directors is charged with exercising its independent judgment to determine whether the authorizations at issue constitute a “project” within the meaning of the California Environmental Quality Act (CEQA); and if they do constitute a project, whether they are exempt from CEQA review.



Authorizing the Board President to execute the Settlement Agreement and the related documents; authorizing legal counsel to commence the Adjudication Action; and authorizing Staff to submit the GSP alternative to DWR does not constitute a “project” subject to CEQA because these are not activities that may cause either a direct or reasonably foreseeable indirect change in the environment. (Pub. Res. Code § 20165; CEQA Guidelines § 15378(a).) Further, the authorizations are not a project subject to CEQA because the Court will oversee and implement the Adjudication Action and Stipulated Judgment and CEQA does not apply to the courts of the state. (CEQA Guidelines § 15379.) CEQA only applies to specified actions taken by a “public agency” (Pub. Res. Code § 21065) and CEQA Guidelines section 15379 explicitly states that the term public agency “does not include the courts of the state.” The authorizations are therefore not a project because the Adjudication Action and Stipulated Judgment will be approved, overseen and implemented by the Court and by the Watermaster, the Watermaster Technical Consultant, and the Technical Advisory Committee under the Court’s supervision, and none of these are public agencies. (CEQA Guidelines § 15379; see *Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 550-51 (West Coast Basin); *Calif. Am. Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 481-82 (Seaside Basin).)

Even if the authorizations discussed above are deemed a project subject to CEQA, they are exempt under California Water Code section 10728.6. Under section 10728.6. GSPs adopted pursuant to SGMA are exempt from CEQA. Because SGMA specifically authorizes GSP alternatives, the exemption applies to the authorizations described in this staff report. Finally, the authorizations are also exempt under the “common sense exemption.” (CEQA Guidelines § 15061(b)(3).) The authorizations do not by themselves authorize or approve any project, development, or construction activity. Accordingly, it can be seen with certainty that the authorizations will not lead to any physical changes in the environment. There is no evidence that the authorizations involve any unusual circumstances that might cause a significant effect on the environment. (CEQA Guidelines § 15300.2.)

## 5. Conclusion

The Borrego Basin is critically overdrafted and must be sustainably managed under SGMA, but SGMA cannot declare or modify groundwater rights, so management under SGMA could lead to litigation. Here, stakeholders in the Basin, including BWD, seek to manage the Basin through a combination of a court-entered judgment and a DWR-approved groundwater management plan. This proposal intends to create greater certainty regarding groundwater rights in the Basin and to result in the sustainable management of the Basin in perpetuity as required by SGMA.

ATTACHMENTS:

DOCUMENTS CAN BE FOUND ON: [www.BorregoWD.org](http://www.BorregoWD.org) (Home Page Bulletin Board)

RESOLUTION NO 2020-01-01 OF THE  
BOARD OF DIRECTORS OF BORREGO WATER DISTRICT AUTHORIZING BOARD  
PRESIDENT TO EXECUTE SETTLEMENT AGREEMENT; AUTHORIZING LEGAL  
COUNSEL TO FILE ADJUDICATION ACTION; AUTHORIZING STAFF TO SUBMIT A  
GROUNDWATER SUSTAINABILITY PLAN ALTERNATIVE TO THE CALIFORNIA  
DEPARTMENT OF WATER RESOURCES; AND AUTHORIZING STAFF TO FILE  
NOTICE OF EXEMPTION

WHEREAS, in 2014, the State of California adopted the Sustainable Groundwater Management Act (“SGMA”), which took effect in 2015, and requires local agencies to manage groundwater basins designated as high or medium priority basins.

WHEREAS, the Borrego Springs Subbasin No. 7.024-01 (“Borrego Basin” or “Basin”) was designated by the California Department of Water Resources (DWR) as high priority and critically overdrafted under SGMA.

WHEREAS, SGMA requires that a groundwater sustainability plan (GSP) or alternative must be adopted and submitted by a local agency by January 31, 2020 for basins such as Borrego Basin that have been designated as subject to conditions of critical overdraft.

WHEREAS, SGMA provides for the submission of a proposed stipulated judgment to DWR for evaluation and assessment, as part of an adjudication action, as an alternative to a GSP.

WHEREAS, the Borrego Valley Groundwater Sustainability Agency, which comprised the District and the County of San Diego, developed a GSP for the Borrego Basin. The GSP has been repurposed as a Groundwater Management Plan (GMP), an integral part of a proposed Stipulated Judgment for the Borrego Basin (Stipulated Judgment), and the District believes it prudent to implement a “Physical Solution” as part of a forthcoming groundwater rights adjudication action, consistent with the requirements of SGMA (Adjudication Action).

WHEREAS, the District is a local agency that believes management pursuant to a proposed Stipulated Judgment approved as part of an Adjudication Action, including a proposed Physical Solution and GMP, will satisfy the objectives and requirements of SGMA to manage the Borrego Basin.

WHEREAS, the entry of the Stipulated Judgment requires the filing of an Adjudication Action to comprehensively determine rights to extract and store groundwater in the Borrego Basin pursuant to Code of Civil Procedure sections 830, et seq.

WHEREAS, the District and other Basin groundwater pumpers propose to enter into a Settlement Agreement to resolve disputes they may have regarding their respective rights to pump groundwater from the Borrego Basin and to agree to a proposed Stipulated Judgment that will establish a Physical Solution, including a GMP, for the perpetual, sustainable management of the Borrego Basin as required by SGMA and the California Constitution.

WHEREAS, the Stipulated Judgment, GMP, and the Physical Solution have been developed through a process of stakeholder negotiations among the District, major water pumpers, and landowners in the Borrego Basin to serve as an alternative to a GSP and to constitute the functional equivalent of a GSP as permitted by SGMA and the California Code of Regulations.

WHEREAS, the Settlement Agreement provides that the District intends to file the Adjudication Action on or before January 24, 2020.

WHEREAS, the Settlement Agreement provides that the parties will share certain costs related to the Adjudication Action.

WHEREAS, the Settlement Agreement provides that the parties will seek to have the Stipulated Judgment attached thereto approved by DWR and entered by the court as the final judgment in the Adjudication Action.

WHEREAS, the parties to the Settlement Agreement agree to certain interim Basin management measures pending the entry of judgment in the Adjudication Action.

WHEREAS, the Settlement Agreement, Stipulated Judgment, Physical Solution, GMP, and supporting documents have been subject to a 30-day public review process.

WHEREAS, the execution of the Settlement Agreement, filing of the Adjudication Action, and entry of the Stipulated Judgment, including imposition of the Physical Solution and the GMP, are intended to comprehensively determine and adjudicate all groundwater rights in the Borrego Basin and to provide a physical solution for the perpetual, sustainable management of the Borrego Basin as required by SGMA and the California Constitution.

WHEREAS, authorizing the Board President to execute the Settlement Agreement and the related documents; authorizing legal counsel to commence the Adjudication Action; and authorizing Staff to submit the GSP alternative to DWR does not constitute a "project" subject to the California Environmental Quality Act (CEQA) because these are not activities that may cause either a direct or reasonably foreseeable indirect change in the environment. (Pub. Res. Code § 20165; CEQA Guidelines § 15378(a).) Further, the authorizations are not a project subject to CEQA because the Court will oversee and implement the Adjudication Action and Stipulated Judgment and CEQA does "not apply to the courts of the state." (CEQA Guidelines

§ 15379; *Hillside Memorial Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th

534, 550-51 (West Coast Basin); *Calif. Am. Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 481-82 (Seaside Basin).) Even if the authorizations are deemed a project subject to CEQA, they are exempt under California Water Code section 10728.6 as a statutorily-authorized GSP alternative. Finally, the authorizations are exempt under the "common sense exemption" because by themselves, they do not authorize or approve any project, development, or construction activity. (CEQA Guidelines § 15061(b)(3).) Accordingly, it can be seen with certainty that the authorizations will not lead to any adverse physical changes in the environment. There is no evidence that the authorizations involve any unusual circumstances that might cause a significant effect on the environment. (CEQA Guidelines § 15300.2.)

NOW, THEREFORE, be it resolved by the Board of Directors of the Borrego Water District, as follows:

1. The Board of Directors hereby authorizes the Board President or her designee to execute the Settlement Agreement, and all other related documents, attached hereto as Exhibit "A."
2. The Board of Directors hereby authorizes District legal counsel to file the Adjudication Action pursuant to the terms of the Settlement Agreement.
3. The Board of Directors further delegates to the District General Manager and District legal counsel authority to finalize for the Board President's execution the final form of the Settlement Agreement, including the Stipulated Judgment, Physical Solution, GMP, and other related documents.

4. The Board of Directors hereby authorizes District staff to submit the proposed Stipulated Judgment, including its attached GMP to DWR for review and approval to serve as an alternative to a Groundwater Sustainability Plan pursuant to SGMA. District staff is also directed to file with DWR, as appropriate, a “Coordination Document” and/or “checklist” that explains how the GMP and other documents satisfy SGMA’s requirements.

5. The Board of Directors further delegates to the District General Manager and District legal counsel authority to finalize and submit the final form of Stipulated Judgment, GMP and other related documents to DWR for review and approval to serve as an alternative to a Groundwater Sustainability Plan pursuant to SGMA.

CEQA Compliance:

a. For all the reasons stated in the above recitals and based upon substantial evidence in the record as a whole, the Board of Directors finds that authorizing the Board President to execute the Settlement Agreement and the related documents; authorizing legal counsel to commence the Adjudication Action; and authorizing Staff to submit the GSP alternative to DWR: (1) is not a “project” subject to CEQA because these are not activities that may cause either a direct or reasonably foreseeable indirect change in the environment (Pub. Res. Code § 20165; CEQA Guidelines § 15378(a).); (2) is not a project subject to CEQA because the Court will oversee and implement the Adjudication Action and Stipulated Judgment and CEQA does “not apply to the courts of the state” (CEQA Guidelines § 15379); (3) alternatively, is exempt under California Water Code section 10728.6 as a statutorily-authorized GSP alternative and under CEQA Guideline § 15061(b)(3)’s “common sense exemption”; and (4) none of the exceptions to the application of the common sense exemption exist under State CEQA Guidelines § 15300.2.

b. The Board of Directors hereby directs that all documents and other materials constituting the record of proceedings related to this Resolution be maintained by the General Manager of the Borrego Water District, or his designee, on file at the Borrego Water District, 806 Palm Canyon Drive, Borrego Springs, California 92004.

c. The Board of Directors directs Staff to file a Notice of Exemption with the County Clerk for the County of San Diego.

**PASSED AND ADOPTED** at a regular meeting of the Board of Directors of the Borrego Water District held on the 7th day of January 2020, by the following vote:

**Ayes:**

**Noes:**

**Absent:**

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President

Board of Directors of Borrego Water District

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Secretary

ATTEST

BORREGO WATER DISTRICT  
BOARD OF DIRECTORS MEETING  
JANUARY 7, 2020  
AGENDA ITEM III.C

January 3, 2020

TO: Board of Directors

FROM: Geoffrey Poole, General Manager

SUBJECT: Schedule for Nominating and/or Selecting Water Master Board Community and Borrego Water District Representatives – Core Team

**RECOMMENDED ACTION:**

Discuss schedule for selection of WM Community and BWD Representatives for Water Master Board

**ITEM EXPLANATION:**

If the Stipulated Judgment is approved, Staff is requesting a Board discussion of possible meeting dates for the selection of the Community and Representatives on the WM Board.

The Committees who have been sked to provide nominees for the Community Rep position has been discussing this issue and Staff will have an update for the Board at the meeting on 1-7-20.

Staff's goal is to get both positions filled as soon as practical.

**NEXT STEPS**

Staff and CT implement Board direction on this issue

**FISCAL IMPACT**

N/A

**ATTACHMENTS**

None

BORREGO WATER DISTRICT  
BOARD OF DIRECTORS MEETING  
JANUARY 7, 2020  
AGENDA ITEM III.D

January 3, 2020

TO: Board of Directors

FROM: Geoffrey Poole, General Manager

SUBJECT: Cancellation of Borrego Basin Groundwater Sustainability Plan Public Hearing – S Anderson

**RECOMMENDED ACTION:**

If Stipulation is approved, cancel previously scheduled GSP Public Hearing

**ITEM EXPLANATION:**

The GSP process required submittal of the document by 1-31-20 and prior to that a Public Hearing is to be held. To facilitate successful negotiation of the Stipulation but also provide a safety net in the event negotiations are not successful, a Public Hearing was scheduled for January 14<sup>th</sup>.

**NEXT STEPS**

Do not hold Public Hearing

**FISCAL IMPACT**

N/A

**ATTACHMENTS**

None