

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	Borrego Springs Unified School District Elementary School Well, James Markman - Atty
#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 as management proceeds.

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 minimis 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.⁴*

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
Stipulated Judgment – Borrego Springs Sub Basin
January 3, 2020

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Comments/Questions & Response when Necessary

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.

Fallowing Standards/Transfers

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.