

SETTLEMENT AGREEMENT

DRAFT

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SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by and between the Persons listed in the attached Exhibit A (“Parties”) to establish the terms and process for their stipulation to a judgment that comprehensively determines and adjudicates all rights to pump and store groundwater in the Borrego Springs Subbasin (“Basin”) of the Borrego Valley Groundwater Basin and that establishes a Physical Solution for the Sustainable Groundwater Management for the Basin and complies with Article X, section 2 of the California Constitution.

RECITALS

A. In 2014, the State of California adopted the Sustainable Groundwater Management Act (California Water Code sections 10720–10737.8, et al.) (“SGMA”) “to manage groundwater basins through the actions of local government agencies to the maximum extent feasible,” and to provide local public agencies acting as GSAs with the authority and technical and financial assistance necessary to achieve basin sustainability (California Water Code section 10720.1).

B. Pursuant to SGMA, in October 2016, the California Department of Water Resources (DWR) released final 2016 modifications to California’s groundwater basin boundaries (Bulletin 118 Basins (2016 Edits)), which included the subdivision of the Borrego Valley Groundwater Basin (BVGB) into two separate subbasins: the Borrego Springs Groundwater Subbasin (7-024.01) and the Ocotillo Wells Groundwater Subbasin (7-024.02).

C. The Borrego Valley Groundwater Subbasin No. 7.024-01 (“Borrego Basin” or “Basin”) is the subject of this Agreement and was designated by DWR as high priority and critically Overdrafted under SGMA.

D. Under SGMA, Borrego Water District (BWD) and the County of San Diego (County) were designated as the Borrego Valley Groundwater Sustainability Agency (“GSA”) for the Borrego Basin. BWD and the County entered into a Memorandum of Understanding which memorialized each agency’s roles and responsibilities for developing a groundwater sustainability plan (GSP) for the Borrego Basin. The deadline for the Borrego Valley GSA to adopt a GSP is January 31, 2020.

E. A draft GSP for the Borrego Basin was prepared and circulated for a sixty-day public review and comment period through May 21, 2019. A draft final GSP (the “Draft Final GSP”) was published on the County’s Borrego GSP website on August 30, 2019. No public hearing was held under Water Code section 10728.4 for the GSA to consider adopting the GSP. By letter dated October 17, 2019, the County formally announced its decision to withdraw from being a GSA without adopting the GSP by notifying DWR under Water Code section 10723.8(e).

F. Each of the Parties is a Groundwater Pumper. Exhibit A, which is incorporated herein by this reference, identifies the real property owned by each Party, and the amount of Groundwater Pumped by the Party during the five calendar years before the filing of the complaint based on meter readings, or where meter readings are not available, calculated by the GSA’s consultant using the method developed by the GSA to calculate BPA.

G. Most of the Parties submitted comments objecting to the GSA’s alleged failure to comply with procedural and substantive requirements of SGMA in preparing the Draft Final GSP, but are willing to support a substantially similar Groundwater Management Plan (“GMP”) as part of the Physical Solution administered by a Court-established watermaster, with input from a Technical Advisory Committee (“TAC”) pursuant to the Judgment entered by the Court in a Comprehensive Adjudication under California Code of Civil Procedure Section 850, subd. (b), including entry of the Judgment on an interlocutory basis pursuant to a request for preliminary injunction under Code of Civil Procedure Sections 847 and 850.

H. The Parties desire to resolve any and all disputes they have or may have regarding their rights to pump groundwater from the Borrego Basin and to establish a Physical Solution for the perpetual management of the Basin, which Physical Solution will achieve Sustainable Groundwater Management for the Basin consistent with Article X, section 2 of the California Constitution.

I. The Parties collectively comprise more than 50 percent of all Persons who Pump Groundwater in the Basin and the Parties collectively Pump at least 75 percent of the Groundwater Pumped in the Basin during the five (5) years preceding this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, the mutual understandings contained in this Agreement, and other good, valuable, and sufficient consideration, the Parties hereto agree as follows:

1. Definitions and Exhibits.

1.1 **Definitions.** Capitalized terms used in this Agreement shall have the meanings set forth below.

1.1.1 **Adjudication Action** – The Comprehensive Adjudication that the BWD will file pursuant to this Agreement.

1.1.2 **Base Production Allocation or BPA** - As defined in Section I.A. of the Judgment.

1.1.3 **Basin or Borrego Basin** – Borrego Springs Subbasin of the Borrego Valley Groundwater Basin as defined by California Department of Water Resources (DWR) Bulletin No. 118 as Subbasin No. 7.024-01.

1.1.4 **BWD** - Borrego Water District.

1.1.5 **Comprehensive Adjudication** – An action filed to comprehensively determine rights to extract and store Groundwater in the Basin pursuant to Code of Civil Procedure Sections 830 et seq.

1.1.6 **DWR or “Department”** – The California Department of Water Resources.

1.1.7 **Groundwater** – Water beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels.

1.1.8 **Groundwater Pumper** – Any Person extracting or pumping Groundwater from the Basin.

1.1.9 **GSA** – Groundwater Sustainability Agency as defined by SGMA.

1.1.10 **GSP** – Groundwater Sustainability Plan as defined by SGMA.

1.1.11 **Judgment** – The Stipulated Judgment attached as Exhibit C to this Agreement, which the Parties will seek to have entered by the court as the final judgment in the Adjudicated Action.

1.1.12 **Overdraft** – The sustained cumulative Pumping of Groundwater from the Basin in quantities that exceed the Basin’s Sustainable Yield.

1.1.13 **Parties or Party** – Any Person(s) that is a signatory to this Agreement.

1.1.14 **Person** – Includes, but is not limited to, corporations, partnerships, trusts, firms, counties, local agencies, state agencies, federal agencies, tribes, business entities, individuals, and groups of individuals.

1.1.15 **Physical Solution** – The terms of the Judgment, including the GMP, attached to the Judgment as Exhibit 1, which are intended to achieve Sustainable Groundwater Management and comply with Article X, section 2 of the California Constitution, which may be modified over time in compliance with the procedures described in the Judgment.

1.1.16 **Planning and Implementation Horizon** – The 50-year time period over which this Court determines that the Physical Solution prescribed by the Judgment will be implemented to ensure that the Basin is operated within its Sustainable Yield, consistent with SGMA (Water Code, §10721(r).)

1.1.17 **Pump** – The process of extracting Groundwater from the Basin.

1.1.18 **Pumper** – A Party who Pumps Groundwater from the Basin.

1.1.19 **SGMA** – The Sustainable Groundwater Management Act set forth at California Water Code sections 10720, et seq.

1.1.20 **Sustainable Groundwater Management** – Management of the Basin and Pumping and use of Groundwater from the Basin in a manner that can be maintained during the Planning and Implementation Horizon without causing Undesirable Results, consistent with SGMA (Water Code, § 10721(v).)

1.1.21 **Technical Advisory Committee** – The advisory body established pursuant to Section IV.F. of the Judgment.

1.1.22 **Watermaster** – The special master to the Court appointed pursuant to Section IV.B. of the Judgment for the purpose of executing the powers, duties, and responsibilities assigned therein.

1.2 **Exhibits**. Following is a list of exhibits included in this Agreement:

Exhibit A – List of Parties to this Settlement Agreement and 2015-2019 Pumping

Exhibit B – Form Answer To Adjudication Complaint

Exhibit C – Proposed Stipulated Judgment

Exhibit D – Stipulation

Exhibit E – Interim Watermaster Budget

2. **Adjudication Action**. Following the Effective Date, BWD will file the Adjudication Action in the Superior Court for the County of San Diego on or before January 24, 2020, subject to extension for reasonable delay beyond the control of the BWD. The Adjudication Action is to comprehensively determine and adjudicate all Groundwater rights in the Basin and provide a physical solution for the perpetual and continuous management of the Basin, which perpetual management will achieve Sustainable Groundwater Management for the Basin consistent with the substantive objectives of SGMA and with the reasonable and beneficial use doctrine under Article X, section 2 of the California Constitution.

2.1 **Service and Appearance in the Adjudication Action**. The Parties and each of them agree to accept service of the Notice of Commencement of Groundwater Basin Adjudication, Complaint, and draft Answer to Adjudication Complaint, and return a return receipt pursuant to Code of Civil Procedure section 836. The Parties and each of them agree to complete and file the Answer to Adjudication Complaint in substantially the form attached hereto as Exhibit B within [redacted] days of service. Any Party who objects to any modification to the Judgment or other action by the Court inconsistent with this Agreement or the Judgment may amend its answer and file such other response to the Complaint as specified in Section 5 below, and BWD shall not object to the filing of any such amended answer. BWD shall be under no obligation to serve the Complaint until it receives deposits of the cost of serving the Complaint pursuant to the terms of Section 2.4.

2.2 **Request for Preliminary Injunction During Pendency of Adjudication Action**. No later than sixty (60) days following the date that the BWD files with the Court the notice of completion of mailing required by Section 836, subd. (e) of the Code of Civil Procedure, the Parties shall submit to the Court a request for a preliminary injunction, pursuant to Code of Civil Procedure, section 847, to provide for the management of the Basin consistent with the terms of the Judgment, on an interlocutory basis, during the pendency of this Action through the entry of the Judgment and any appeal thereof, including without limitation the appointment of an interim Watermaster. Such application to the Court may also address other issues, as determined by the Parties. The Parties shall meet and confer and cooperate in good faith regarding the contents of the request for preliminary injunction.

2.3 **Cooperation in the Prosecution of the Adjudication Action.** The Parties shall cooperate with each other in pursuing and obtaining interlocutory and permanent entry of the Judgment consistent with the provisions of this Agreement.

2.4 **Sharing of Costs and Expenses Associated with Notice and Service and Calculating 2015-2019 Basin Production.** The Parties agree to share the costs and expenses associated with notice and service of the Complaint, service of the request for preliminary injunction, the costs and expenses for determination of 2015-2019 Basin Production (“2015-2019 Basin Production Table”) for purposes of making the showing required to proceed under the Code of Civil Procedure, section 850, and the costs and expenses for a third party to prepare a written explanation (“Coordinating Document”) to support submission of the Judgment as an alternative regarding how and why the Judgment complies with SGMA. The Parties also agree to proportionately share the costs for development of an informational website and retention of a mutually-agreeable third party in advance of service of the Complaint under CCP section 835 et seq., in order to respond to inquiries from landowners overlying the Basin regarding the Complaint and associated questions (“Informational Website and Third Party Landowner Response Costs”). The costs and expenses to be shared pursuant to this Section 2.4 will be apportioned among the Parties in proportion to the percentage that each Party’s BPA (pursuant to Exhibit 4 to the Judgment) bears to the total BPA of all Parties to this Agreement and will be paid within 30 days of receipt of an invoice from the Party(ies) actually incurring expenses from such third parties specifying such costs and expenses and each Party’s proportionate share. Invoices for the costs and expenses for retained experts will be sent in advance of the Party(ies) actually incurring expenses from such third parties, based upon the written estimates provided by such third parties. BWD will contract for preparation of the 2015-2019 Basin Production Table and the retention of a company to assist in serving the Complaint. [AAWARE Parties] will contract for the preparation of the Coordinating Document. T2 Borrego , LLC, will contract for the Informational Website and Third Party Landowner Response Costs. If needed and at the time needed, the Parties will contract for and share pursuant to this Section 2.4 the costs for mail service of the request for preliminary injunction and the other pleadings and documents required to be served under Code of Civil Procedure, section 835 et seq., with the understanding that the Parties will endeavor to seek Court approval as early as possible after service of the Complaint to serve pleadings and papers electronically, per Code of Civil Procedure, section 839.

2.5 **Attorney’s Fees incurred in Connection with Adjudication Action.** Each Party shall bear its own costs of appearance and attorney’s fees incurred in the Adjudication Action. The Parties shall cooperate in preparing the pleading documents, preliminary injunction documents and other motion documents to bring about entry of the Judgment, and shall seek to equitably divide the in-kind contributions of attorney and consultant work associated with the preparation of such documents.

3. **Entry of Judgment and Submittal to DWR for Approval.** The Parties agree to entry of Judgment in the form attached hereto as Exhibit B and incorporated herein by reference. Following determination by DWR that the Judgment satisfies the objectives of SGMA, the Parties shall sign the Stipulation attached hereto as Exhibit D and submit a request to the Court for entry of the Judgment pursuant to the procedures set forth in Code of Civil Procedure sections 830 et seq. Prior to entry of the Judgment, the Parties agree to submit the proposed Stipulated Judgment to the Department for review and approval to serve as an alternative to a

Groundwater Sustainability Plan pursuant to SGMA (Alternative Plan). (Water Code, §§10733.6; 10737.4.) The Parties shall submit the Alternative Plan to DWR prior to January 31, 2020.

4. **Actions Pending Entry of Judgment.** The Parties agree to be bound by and operate under the provisions of the Judgment on an interim basis pending entry of Judgment commencing on January 31, 2020.

4.1 **Interim Watermaster.** No later than February 1, 2020, the Parties shall establish an interim Watermaster pending entry of the Judgment. The interim Watermaster will be constituted and operate pursuant to the terms of Section IV.B of the Judgment. The Parties agree to fund the interim Watermaster budget attached hereto as Exhibit E in accordance with Section 4.4, below. The interim Watermaster will have the power to enforce the terms of this Agreement and the Judgment as against the Parties and all other Persons that are a party to the Adjudication Action to the greatest extent allowed by law and to the extent authorized by the Court. Until a final judgment is entered by the Court in this action and all appeals are complete, the interim Watermaster shall assume all responsibility for the sustainable management of the Basin as set forth in the attached Judgment, including without limitation enforcement of rampdown, issuing annual reports, collecting assessments, issuing status and eligibility letters, contracting for technical work, and following its rules, among other items. During this time, the GSA will be dormant, and thus the GSA will not perform any groundwater management actions or assess any fees or assessments. In the event that any matter develops in advance of the entry of the final Judgment by the Court that threatens to cause a material and imminent adverse impact to the Basin, or threatens to adversely affect implementation of this Agreement or the proposed Judgment, the Parties agree to promptly file a motion with the Court to obtain an order and instruction from the Court to address and remedy the adverse development. Within 60 days of entry of the Judgment, BWD will withdraw as the GSA by notice to the Department in accordance with Water Code section 10723.8.

4.2 **Meter Installation.** No later than March 31, 2020, each Party shall install, at its own expense, meters in conformance with Section VI.A of the Judgment.

4.3 **Water Quality Monitoring Plan.** The Parties agree to fund the continuation of the County-initiated program of water quality monitoring in the Basin that was conducted through March 2019 as part of GSP development until the Court approves the formation of the permanent Watermaster and the TAC agrees to a new or modified water quality monitoring program.

4.4 **Funding of Actions.** The Parties agree that all Persons proposed to receive BPA pursuant to the Judgment will benefit from the actions set forth in this Section 4 of this Agreement. The Parties therefore shall, as part of the request for a preliminary injunction made pursuant to Section 2.2 of this Agreement, request that the Court order Persons that are not a Party to this Agreement, but which are proposed to receive BPA pursuant to the Judgment, to participate in the funding of such actions. If the Court so orders, each Person proposed to receive BPA pursuant to the Judgment will be assessed by Watermaster an assessment to fund such actions in proportion to the percentage that each Person's proposed BPA (pursuant to Exhibit 4 to the Judgment) bears to the total BPA proposed to be granted to all Persons pursuant

to the Judgment. If the court does not so order, each Party proposed to receive BPA pursuant to the Judgment will be assessed by Watermaster an assessment to fund such actions in proportion to the percentage that each Party's proposed BPA (pursuant to Exhibit 4 to the Judgment) bears to the total BPA proposed to be granted to all Parties pursuant to the Judgment.

5. **Actions by DWR or Court Inconsistent with Agreement or Judgment.** Should DWR determine that revisions to the Judgment are required to satisfy the objectives of SGMA, or should the Court take an action inconsistent with this Agreement or the Stipulated Judgment, any objecting Party shall notify the other Parties ("Notice of Opposition") within fifteen calendar days of its bases for opposition. During a period of thirty calendar days following receipt of a Notice of Opposition ("Cure Period"), the Parties shall meet and confer in good faith to negotiate revisions to the Judgment, but shall continue to operate under the terms of this Agreement and the Judgment during the Cure Period. In the event negotiations by the Parties do not result in revisions to the Judgment approved by all Parties, the Parties understand that the Court may nevertheless adopt the modifications to the Judgment if the Court finds that the Judgment, as modified, satisfies the provisions of Code of Civil Procedure section 850. After expiration of the Cure Period, each Party shall have a period of thirty calendar days in which to file an amended Answer and other response to the Complaint in the Adjudication Action pursuant to contested adjudication proceedings. Notwithstanding any compromise accepted in this Agreement or in the Judgment, each Party reserves all rights to oppose any modification to the Judgment or other action by the Court inconsistent with this Agreement or the Judgment.

6. **Miscellaneous Provisions.**

6.1 **Reimbursement of BWD for GSP Preparation Cost.** The Parties agree to reimburse BWD a total of \$340,000.00 for its GSP preparation costs. Such costs will be imposed on each Person, including BWD, in proportion to the percentage that each Person's BPA (proposed to be granted pursuant to Exhibit 4 to the Judgment) bears to the total BPA proposed to be granted to all Persons pursuant to the Judgment. The Parties shall collectively request, as part of the request for a preliminary injunction made pursuant to Section 2.2 of this Agreement, that the Court order Persons that are not a Party to this Agreement that are receiving a proposed grant of BPA pursuant to the Judgment, to pay their proportion of the BWD reimbursement pursuant to the terms of this Section 6.1. Watermaster will collect the proportionate BWD reimbursement owed by all Persons other than BWD for reimbursement to BWD through three annual and equal installments assessed in June of 2020, June of 2021, and June of 2022. The Watermaster shall remit all funds collected to BWD without charge for any Watermaster administrative or overhead time. Any such assessments not timely paid by Pumpers will be subject to collection by the Watermaster pursuant to Section V of the Judgment or on court motion by BWD, and be subject to the maximum legal interest and be collectable through any and all procedures legally available to the Watermaster.

6.2 **Best Efforts and Mutual Cooperation.** The Parties shall use their best efforts to effect this Agreement and its purpose. The Parties agree to take any and all reasonable steps that may be necessary in that regard, as long as those steps do not require any material deviations from the terms of this Agreement or impose material new obligations beyond those contemplated by this Agreement.

6.3 **Notice.** Each Party shall designate the name, address, and e-mail address to be used for purposes of all notices and service under this Agreement and provide written notice of any change to such information.

6.4 **Admissibility.** This Agreement and its terms shall not be used or introduced as evidence against any of the Parties hereto for any purpose other than to enforce the terms of the Agreement.

6.5 **Representations and Warranties.** The Parties and signatories hereby each represent, covenant, and warrant that they are authorized (individually or by their respective principals) to enter into and execute this Agreement and that they have not previously taken any steps which would adversely affect the rights that are the subject of this Agreement. In the event that the above representation and/or warranty is breached or any of the representation and/or warranty contained in this subparagraph proves false, the breaching/misrepresenting Party hereby agrees to defend, indemnify, and hold the other Party harmless from all damages, loss, liability, costs, and attorneys' fees resulting from said breach/misrepresentation.

6.6 **Consultation with Legal Counsel.** The Parties represent that they have consulted legal counsel prior to the execution of this Agreement and have executed this Agreement with full knowledge of its meaning and effect.

6.7 **Drafting of Agreement.** This Agreement shall not be construed in favor of, or against, any Party by reason of the extent to which any Party or its counsel participated in the drafting of this Agreement. The language in all parts of this Agreement shall in all cases be construed according to its fair meaning, not strictly for or against any of the Parties hereto.

6.8 **Waiver, Modification, Amendment.** No provision of this Agreement may be waived unless in writing and signed by all Parties hereto. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein. This Agreement may be modified or amended only by a written agreement executed by all of the Parties hereto.

6.9 **No Admission.** The Parties understand and agree that this Agreement is not to be construed as an admission whatsoever on the part of any of them and is made solely for the purpose of avoiding the burden and expense which would be imposed upon the Parties through contested litigation.

6.10 **Jurisdiction.** This Agreement is entered into in the County of San Diego, State of California, and shall be interpreted pursuant to California law. If legal action is necessary to enforce any of the terms of this Agreement, such action shall be brought in accordance with the laws of the State of California in a court having appropriate jurisdiction.

6.11 **Attorneys' Fees Incurred.** In the event of any suit or proceeding arising out of the enforcement or breach of this Agreement, the prevailing Party shall be entitled to recover reasonable attorneys' fees and costs in addition to any other permitted relief.

6.12 **Entire Agreement.** This Agreement including its Exhibits embodies the entire understanding and agreement between the Parties pertaining to the matters described herein and supersedes and cancels all prior oral or written agreements between the Parties. Each Party

acknowledges that no Party, agent, or representative of the other Party has made any promise, representation, or warranty, express or implied, not expressly contained in this Agreement, that induced the other party to sign this document.

6.13 **Binding Effect.** The provisions of this Agreement will be binding upon and inure to the benefit of the Parties to the action and all their successors in interest, including, but not limited to, heirs, executors, administrators, assigns, lessees, licensees, the agents and employees of the Parties and all their successors in interest, consistent with Section 851 of the Code of Civil Procedure.

6.14 **Effective Date.** This Agreement shall take effect immediately upon execution by enough Parties as will satisfy the requirements of California Code of Civil Procedure Section 850, subd. (b), subject to the terms set forth herein.

6.15 **Counterparts.** This Agreement may be executed in separate counterparts, the whole of which shall constitute a binding agreement. Facsimile signatures and email/PDF signatures, when received, shall have the same force and effect as original signatures.

6.16 **Third Party Beneficiaries.** There are no intended third party beneficiaries of any right or obligation of the Parties created under this Agreement.

6.17 **Cooperation; Further Acts.** The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate or convenient to attain the purposes of this Agreement.

6.18 **Attorney's Fees and Costs.** Except as otherwise provided herein below, each Party shall bear its own attorney fees, expert witness fees, and litigation costs incurred in connection with the Adjudication Action.

6.19 **Condition Subsequent.** In the event that the Judgment or a judgment substantially in the form of the Judgment agreed upon by the Parties is not entered by the Court in the Adjudication Action and the Parties are required to adjudicate their respective rights to groundwater in the Borrego Basin, this Agreement and all of the obligations therein shall terminate and be of no further force and effect, except that the provisions of Sections 2.4, 5, 6.1 and 6.9 of this Agreement will remain binding rights and obligations of the Parties.

WHEREFORE, the undersigned, having read the foregoing Settlement Agreement and fully understanding and agreeing to its terms, hereby execute this Agreement and make it effective on the date of the last signature hereto.

[Signatures on the following page.]

Dated: _____

By: _____

DRAFT

EXHIBIT B
FORM ANSWER TO ADJUDICATION COMPLAINT
ATTACHED

DRAFT

EXHIBIT C
PROPOSED STIPULATED JUDGMENT
ATTACHED

DRAFT

EXHIBIT D
STIPULATION
ATTACHED

DRAFT

EXHIBIT E
INTERIM WATERMASTER BUDGET
ATTACHED

DRAFT