

To: Borrego Springs Basin Advisory Committee

From: Thomas S. Bunn III

Date: October 24, 2017

Re: Response to Agricultural Representatives Agenda Paper #1

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This is a response to the Agricultural Representatives Agenda Paper #1, dated September 21, 2017. The paper contains a number of omissions and incorrect statements. This memo does not attempt a line-by-line rebuttal, but points out the most significant issues.

### **The paper ignores the prescriptive right of the Water District**

The paper repeatedly makes the point that the groundwater rights of overlying landowners have priority over municipal water rights. It fails to mention, however, that this is only true if the municipal water rights are appropriative rights, not if they are prescriptive rights. Overlying rights do not have priority over prescriptive rights. "Acquisition of a prescriptive right in groundwater rearranges water rights priorities among water users, elevating the right of the one acquiring it above that of an appropriator to a right equivalent in priority to that of a landowner." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 297.)

The prescriptive right of the Water District is not acknowledged anywhere in the paper. Yet the Water District clearly has acquired a prescriptive right by pumping water in an overdrafted basin for a continuous period of five years, where there was knowledge of the overdraft and where the pumping was actual, open and notorious, hostile and adverse to the overlying users, and under claim of right. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 291.)

"The effect of a prescriptive right [is] to give to the party acquiring it [the Water District] and take away from the private defendant against whom it was acquired [overlying landowners] either (1) enough water to make the ratio of the prescriptive right to the remaining rights of the private defendant as favorable to the former in time of subsequent shortage as it was throughout the prescriptive period or (2) the amount of the prescriptive taking, whichever is less." (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 293.) In other words, the pumping during the prescriptive period is reduced pro rata to the safe yield.

Thus, the argument in the paper that agricultural water use cannot be reduced without agreement on an agricultural fallowing and landowner pumping rights transfer program is incorrect.

## **The paper ignores the priority for domestic use in Water Code sections 106, 106.3, and 106.5**

Water Code section 106 states that the domestic use of water is a higher use than irrigation. Water Code section 106.3 declares that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes, and state agencies must take that into account in policies, regulations, and grant criteria. Water Code section 106.5 provides for the protection of the right of a municipality to acquire and hold rights to the use of water for existing and future uses.

It is routinely argued in groundwater adjudications that these statutes mean that domestic and municipal uses should get priority in times of shortage. Because adjudications are generally resolved by settlement, no appellate court has yet considered the nature and extent of this priority. But in the recent Santa Maria groundwater adjudication, the court did use these statutes to support its conclusion that parties with prescriptive rights (who are generally domestic and municipal users) do not lose their rights during times of surplus. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 297.)

For purposes of groundwater allocations under SGMA, Water Code sections 106, 106.3, and 106.5 furnish a powerful argument that domestic and municipal uses should not suffer the same reductions as irrigation.

## **Even if the Water District did not have a prescriptive right, the landowners would still have to reduce their pumping**

The paper does not acknowledge that landowners, who represent the vast majority of pumping, would have to reduce their pumping by almost the same amount, even if no allocation were made to the Water District at all. As among overlying users, the rights are correlative: each may use only their reasonable share [of the safe yield] when water is insufficient to meet the needs of all. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 279.)

## **The paper incorrectly cites *Mojave* and other cases**

The paper cites the *Mojave* case (*City of Barstow v. Mojave Water Agency*<sup>1</sup> (2000) 23 Cal.4th 1224) for the proposition that groundwater rights of overlying landowners have priority over municipal water rights. But, as previously stated, that is only true if there are no prescriptive rights, as was the case in *Mojave*. (23 Cal.4th at p. 1241.)

The paper also cites *Mojave* for the following proposition: “[A]n across-the-board reduction of groundwater production by all sectors is contrary to California water law, except in the rare situation where an entire city’s economy is built entirely on junior appropriations in excess of overdraft, which situation does not exist here.” The “situation” described in the *Mojave*

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<sup>1</sup> The paper uses the incorrect name of *City of Barstow v. Adelanto*.

case, however, was not that at all, but where a “restriction to safe yield on a strict priority basis might have deprived parties who had been using substantial quantities of ground water for many years of all further access to such water.” (23 Cal.4th at pp. 1246-47.) That is exactly the situation here.

Finally, the paper says that overlying water rights need to be based on the highest year of production during the period of overdraft. It cites three adjudications for this, but the formula used in those adjudications was based on stipulation, not a judicial ruling. It goes on to say the California Supreme Court has upheld use of the highest year of production, citing *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1727. First, the case was not a Supreme Court case, but a court of appeal case. Second, and more significantly, the formula in the case was again based on a stipulation and was not an issue before the court. It is incorrect to say the formula was “upheld” by the court.

## Conclusion

Groundwater sustainability agencies are given the authority to determine groundwater extraction allocations. (Wat. Code 10726.4(a).) A reasonable approach would be to allocate the Water District its historical use, and allocate the remainder of the safe yield to overlying users, without any compensation to those users. This approach would be consistent with SGMA and California water rights law.