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17 D&J BAUER FAMILY TRUST 11-18-04, et al.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

19 **COUNTY OF ORANGE**

20 Borrego Water District,
21 Plaintiff,

22 v.

23 ALL PERSONS WHO CLAIM A RIGHT TO
EXTRACT GROUNDWATER IN THE
24 BORREGO VALLEY GROUNDWATER
SUBBASIN NO. 7.024-01 WHETHER
BASED ON APPROPRIATION,
25 OVERLYING RIGHT, OR OTHER BASIS
OF RIGHT, AND/OR WHO CLAIM A
26 RIGHT TO USE OF STORAGE SPACE IN
THE SUBBASIN; et al.,
27 Defendant.

Case No. 37-2020-00005776
Judge: Peter J. Wilson
Dept: CX102

**MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR ENTRY OF
STIPULATED JUDGMENT AND ORDER
OF FINANCIAL REIMBURSEMENT, OR
ALTERNATIVELY FOR PRELIMINARY
INJUNCTION**

Date: April 8, 2021
Time: 2:00 p.m.

Complaint filed: January 30, 2020
Trial Date: None Set

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1 PLAINTIFF BORREGO WATER DISTRICT (“BWD”) and DEFENDANTS T2
2 BORREGO LLC; T2 FARMS LLC; T2 HOLDING LLC; DAVID AND JULI BAUER AS
3 TRUSTEES OF THE D&J BAUER FAMILY TRUST 11-18-04, JM ROADRUNNER, LLC;
4 SELEY RANCHES, L.P.; SHENANDOAH GROWERS, INC.; GAMINI D. WEERASEKERA;
5 THE JENSEN FAMILY TRUST DATED AUGUST 5, 1983; THE SOMMERVILLE TRUST
6 DATED NOVEMBER 22, 1983; TRUST A OF THE CONZELMAN FAMILY TRUST DATED
7 NOVEMBER 22, 1983; TRUST C OF THE CONZELMAN FAMILY TRUST DATED
8 NOVEMBER 22, 1983; and MICHAEL C. WARD (collectively “Moving Parties”) respectfully
9 submit this memorandum in support of their Motion for Entry of Stipulated Judgment pursuant to
10 Section 850(b) of the Code of Civil Procedure¹ and an order for financial reimbursement or,
11 alternatively, for issuance of a preliminary injunction pursuant to Section 847 in the event that an
12 objection to this motion is brought that necessitates an extended period to resolve.

13 **I. INTRODUCTION**

14 The Moving Parties respectfully request that the Court adopt the proposed stipulated
15 judgment attached to the accompanying Notice of Lodgment (NOL) as Exhibit B (hereafter
16 “Judgment”), which would implement a solution for significant water challenges facing the
17 community of Borrego Springs in eastern San Diego County. The community’s sole source of
18 water is the Borrego Valley Groundwater Subbasin No. 7.024-01 (“Basin”). The California
19 Department of Water Resources (“DWR”) has identified the Basin as in a condition of critical
20 overdraft² and as a high priority basin under the Sustainable Groundwater Management Act
21 (“SGMA”).³ (*See* Wat. Code §§ 10720 *et seq.*)

22 In 2016, under the mandates of SGMA, BWD and the County of San Diego began
23 developing a draft Groundwater Sustainability Plan (“GSP”). Discussions about the draft GSP

24 ¹ Unless indicated otherwise, all further references are to the Code of Civil Procedure.

25 ² A basin is subject to critical overdraft when continuation of present water management practices would
26 probably result in significant adverse overdraft-related environmental, social, or economic impacts. DWR
Bulletin 118. Overdraft occurs where the average annual amount of groundwater extraction exceeds the
long-term average annual supply of water to the basin.

27 ³ In 2014, the State of California adopted SGMA “to provide for the sustainable management of
28 groundwater basins,” and “to provide a more efficient and cost-effective groundwater adjudication process
that protects water rights, ensures due process, prevents unnecessary delay, and furthers the objectives” of
sustainable groundwater management. (Wat. Code § 10720.1.)

1 evolved into negotiations, which resulted in a “Settlement Agreement” entered into among BWD
2 and the majority of groundwater pumpers (“Stipulating Parties”). The Settlement Agreement
3 called for the initiation of this lawsuit to seek adoption of the Judgment to serve as an alternative
4 to a GSP, as allowed by SGMA. (A copy of the Settlement Agreement, as amended, and First
5 Amendment thereto is attached to the NOL at Exs. C and D.) A Groundwater Management Plan
6 (“GMP”), adapted from the draft GSP, is included in the Judgment.⁴ The GMP is to be
7 administered by a Court-established Watermaster, with input from a Technical Advisory
8 Committee (“TAC”) populated by experts in hydrogeology and related sciences. The Judgment
9 and GMP will implement a “physical solution” for the Basin and satisfy the substantive
10 objectives of SGMA. The physical solution embodied in the Judgment is intended to meet the
11 overarching sustainability goal of SGMA to operate the Basin within its sustainable yield without
12 causing undesirable results. Accordingly, the Judgment is designed to:

- 13 1. Comprehensively adjudicate all common law groundwater rights in the Basin consistent
14 with reasonable and beneficial use under Article X, section 2 of the California
15 Constitution;
- 16 2. Provide a physical solution for the long-term management of the Basin and the pumping
17 and use of groundwater without causing undesirable results, consistent with the objectives
18 of SGMA; and
- 19 3. Allow the community to comply with the objectives and dictates of SGMA. (See, NOL
20 Ex. B, at p. 2, Introduction, Section A.)

21 Following the effective date of the original Settlement Agreement, BWD filed this action
22 under the Comprehensive Groundwater Adjudication Statute (Code of Civ. Proc. §§ 830 *et seq.*),
23 which was adopted by the State Legislature in 2015 as a complement to SGMA. It includes
24 methods and procedures for the comprehensive adjudication of groundwater basins and
25 encourages compromise and settlement of groundwater basin adjudications. To that end, the

26
27 ⁴ The executive summary of the GMP is attached to the NOL as Exhibit B.1. The full GMP is 1,626
28 pages. It is available at <https://www.borregowd.org/judgment/> and
<https://www.borregowaterlawsuit.com/documents>. The Moving Parties will provide a hard copy of the
full GMP to the Court.

1 statute provides procedures for conducting such adjudications in a manner that promotes
2 efficiency, reduces unnecessary delays, and provides due process and encourages compromise
3 and settlement. (*See* Code of Civ. Proc. §§ 830(b)(2) & (3).)

4 Consistent with these goals, Section 850 of the statute allows a court to adopt a proposed
5 stipulated judgment that is consistent with the reasonable and beneficial use doctrine set forth in
6 the California Constitution, is consistent with water right priorities of any non-stipulating parties,
7 and treats any objecting parties equitably as compared to the stipulating parties. (Code Civ. Proc.
8 §§ 850(a), (b).) If the stipulated judgment receives a requisite degree of support from
9 groundwater extractors (*see* Code Civ. Proc. § 850(b)⁵), the Court may enter the stipulated
10 judgment over the objection of non-stipulating parties unless those objecting parties prove that the
11 proposed stipulated judgment fails to meet the substantive criteria set forth in subdivision (a) of
12 Section 850. In other words, once the requisite degree of support is achieved, the burden shifts to
13 the objecting parties to demonstrate by a preponderance of the evidence that the judgment does
14 not satisfy the substantive criteria set forth in Section 850.

15 As discussed below, the Judgment submitted by the Moving Parties satisfies the
16 substantive requirements of Section 850 and is supported by the majority of groundwater
17 extractors in the Basin, at levels that exceed the specified thresholds of Section 850(b).
18 Accordingly, the Moving Parties request that the Court adopt the Judgment and, pursuant to
19 Water Code section 10737.4(a)(1), direct BWD to submit the final Judgment to DWR for
20 evaluation and assessment as an alternative to a GSP. The Moving Parties also request that the
21 Court order reimbursement of the proportionate share of costs incurred by the Stipulating Parties
22 in developing and implementing the physical solution for the Basin from those pumpers that are
23 not Stipulating Parties, but will receive the benefits of a pumping allocation under the Judgment.

24 Alternatively, in the event that an objection to this motion is brought that necessitates an
25 extended period to resolve (which the Moving Parties do not anticipate), the Moving Parties

26 _____
27 ⁵ The specific requirements are that the stipulated judgment is supported by more than 50% of all parties
28 who are groundwater extractors in the basin or use the basin for groundwater storage and is supported by
groundwater extractors responsible for at least 75% of the groundwater extracted in the basin during the
five calendar years before the filing of the complaint.

1 respectfully request that the Court issue a preliminary injunction order, pursuant to Code of Civil
2 Procedure section 847, requiring all parties to adhere to the Judgment’s terms while the objections
3 are being resolved. (Code of Civ. Proc. § 850(b).) Section 847 allows the Court to issue a
4 preliminary injunction upon a showing that the Basin is in a condition of long-term overdraft.
5 (See Code of Civ. Proc. § 847.) As noted above, the Basin is in a condition of long-term
6 overdraft, and a preliminary injunction requiring adherence to the Judgment’s terms is necessary
7 to provide for management of the Basin consistent with the terms of the Judgment on an
8 interlocutory basis during the pendency of this action and any appeal thereof, including, without
9 limitation, Court appointment of an interim Watermaster.

10 **II. BACKGROUND FACTS**

11 The underlying comprehensive adjudication action was filed to protect the limited water
12 supply that is vital to the public health, safety, and welfare of all persons and entities that depend
13 upon waters from the Basin, to ensure its reasonable use pursuant to Article X, section 2 of the
14 California Constitution, and to sustainably manage the Basin pursuant to SGMA. BWD is a
15 California Water District and operates wells that extract groundwater from the Basin and provides
16 water services to the Borrego Springs community.⁶ The Defendants are persons who own an
17 interest in one or more parcels in the Basin, and/or extract or store water in the Basin, and/or
18 claim rights or interests in the Basin.

19 **A. The Basin**

20 The Basin, which encompasses approximately 98 square miles in northeastern San Diego
21 County, is the exclusive water supply for the community of Borrego Springs. (Declaration of
22 Arthur Storer Driscoll, III (“Trey”) in Support of Motion for Entry of Judgment (“Driscoll
23 Decl.”), ¶ 24.) The groundwater supplies three primary uses: (1) domestic water supply to the
24 residents of Borrego Springs; (2) roughly 2,000 acres of irrigated agriculture; and (3) recreation

25 _____
26 ⁶ Pursuant to Water Code sections 35408 and 35409, BWD has power to commence and maintain this
27 action which affects the ownership or use of waters or water rights within the District used or useful for
28 any purpose of the District, or a benefit to any land and/or to prevent interference with or diminution of the
natural flow of any stream or natural subterranean supply of waters which may be used or be useful for
any purpose of the district, be of common benefit to the land or its inhabitants, or endanger the inhabitants
or land.

1 and tourism, which includes golf courses and servicing visitors to the Anza-Borrego Desert State
2 Park. (*Id.*)

3 The Basin’s groundwater supply has been diminishing as a result of overdraft for decades,
4 resulting in a decline in groundwater elevations of up to 133 feet from 1953 to 2018. (Driscoll
5 Decl., ¶ 25.) Despite the extended overdraft, it is currently estimated that the Basin still contains
6 approximately 1.5 million acre-feet of groundwater in storage based upon studies of Basin size
7 and water capacity. (*Id.*) If managed sustainably, as proposed under the Judgment, the Basin’s
8 groundwater is expected to sustain the region’s residents and economy in perpetuity. (*Id.* at ¶ 35.)

9 **B. SGMA Activities for the Basin**

10 SGMA requires that all groundwater basins designated by DWR as medium- or high-
11 priority be managed by a groundwater sustainability agency (“GSA”) pursuant to a GSP, unless
12 DWR approves an alternative plan such as a judgment entered in a comprehensive basin
13 adjudication, as proposed here.⁷ (Wat. Code §10733.6(b)(2).) DWR designated the Basin as
14 high-priority and critically overdrafted, requiring the development of a GSP to guide the Basin’s
15 water use to sustainable levels by 2040. (*See* Driscoll Decl., ¶¶ 4, 5.) BWD and San Diego
16 County were designated as the Borrego Valley Groundwater Sustainably Agency (“GSA”) for the
17 Basin and were tasked with developing and implementing a GSP for the Basin.

18 To fulfill this mandate, on October 24, 2016, BWD and San Diego County entered into a
19 memorandum of understanding to develop a GSP for the Basin. (Driscoll Decl., ¶ 6.) The work
20 involved preparing a GSP included gathering and reviewing groundwater data, conducting site
21 investigations and studies, preparing extensive technical analyses regarding groundwater
22 volumes, groundwater quality, and other groundwater metrics in the Basin, as well as drafting
23 chapters of the GSP, in conformance with the SGMA regulations adopted by DWR. (Driscoll
24 Decl., ¶ 7.)

25
26
27 ⁷ Further background about SGMA is available at the following website:
28 <https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management>. SGMA
authorizes DWR to approve use of a judgment entered in a comprehensive groundwater basin adjudication
in lieu of a GSP. (Wat. Code § 10733.6(b)(2).)

1 A significant aspect of developing the draft GSP involved analyzing the volumes of water
2 pumped historically by groundwater users in the Basin. (Driscoll Decl., ¶ 9.) To meet SGMA
3 mandates, the draft GSP determined that total pumping in the Basin would need to be reduced
4 over a 20-year period until the Basin reached “sustainability.” (Driscoll Decl., ¶ 13.) In general
5 terms, this means that pumping would need to be ramped down over time at levels to be
6 determined so that by 2040, total Basin pumping would (subject to climate change and other
7 issues) not exceed the “sustainable yield” of the Basin. (*Id.*)

8 The draft GSP was circulated for a sixty-day public review and comment period through
9 May 21, 2019. (Driscoll Decl., ¶ 14.) The County published a draft final GSP on August 30,
10 2019.⁸ (Driscoll Decl., ¶ 15.) Thereafter, the GSP approval process stopped due to ongoing
11 negotiations amongst groundwater extractors in the Basin, which culminated in the execution of
12 the Settlement Agreement by the Stipulating Parties.

13 The final draft GSP was subsequently repurposed as the GMP and incorporated in the
14 Judgment, which together with the Judgment, constitutes a “physical solution” for the Basin. The
15 GMP characterizes groundwater conditions, trends, and the cumulative impacts of groundwater
16 pumping for each of the SGMA-defined sustainability indicators (Chapter 2); establishes
17 minimum thresholds, measurable objectives, and interim milestones by which sustainability can
18 be measured and tracked (Chapter 3, Sustainable Management Criteria); identifies projects and
19 management actions to be implemented by the Watermaster and/or stakeholders to minimize
20 undesirable results (Chapter 4, Projects and Management Actions); and outlines a plan for annual
21 reporting and periodic (i.e., 5-year) evaluations (Chapter 5, Plan Implementation). The GMP’s
22 initial estimate of sustainable yield, sustainability indicators, management areas, projects and
23 management actions will be refined through the Technical Advisory Committee process. The
24 physical solution documents a viable path, determined by the GSA in collaboration with
25 stakeholders, and informed by the best available information, to achieve the sustainability goal
26

27 ⁸ The MOU and draft final GSP are available at the following website:
28 <https://www.sandiegocounty.gov/content/sdc/pds/SGMA/borrego-valley/GSP.html>. If requested, the
Moving Parties will move for judicial notice of these documents.

1 within the Basin.

2 **C. Settlement**

3 Under the terms of the Settlement Agreement, the Stipulating Parties agreed to seek to
4 have the Judgment entered by the Court as the final judgment in this Comprehensive
5 Adjudication. (See NOL, Exs. C, D.) To avoid water right challenges to the draft GSP,⁹ the
6 Stipulating Parties agreed to settle all common law groundwater rights and integrate pumping
7 allocations into a comprehensive management plan, complete with a suite of management actions,
8 as specified in the Judgment. They also agreed to support the Judgment and the incorporated
9 GMP as a GSP alternative, implement a physical solution administered by a “Watermaster” (a
10 form of special master common in groundwater basin adjudications¹⁰) overseen by the Court
11 through its continuing jurisdiction, and to fund Basin management activities through assessments
12 on pumping.

13 **D. Overview of the Judgment**

14 In a comprehensive adjudication, the court may determine all groundwater rights of a
15 basin, whether based on appropriation, overlying right, or other basis of right, and use of storage
16 space in the basin. (Code of Civ. Proc. § 834(a).) The court’s final judgment in a comprehensive
17 adjudication may also declare the priority, amount, purposes of use, extraction location, place of
18 use of the water, and use of storage space in the basin, together with appropriate injunctive relief,
19 subject to terms adopted by the court to implement a physical solution in the comprehensive
20 adjudication. (Code of Civ. Proc. § 834(b).)

21 The Judgment here (i) comprehensively determines and adjudicates all groundwater rights
22 in the Basin, and (ii) establishes a physical solution for the perpetual and sustainable management
23 of the Basin consistent with the substantive objectives of SGMA and the reasonable and
24 beneficial use of the Basin required by Article X, Section 2 of the California Constitution.

25 _____
26 ⁹ SGMA authorizes GSAs to allocate groundwater and enforce pumping restrictions, but it does not
27 determine or alter water rights. (Wat. Code §§ 10720.5(b), 10726.4(a)(2).) Thus, GSPs are susceptible to
28 water rights challenges, increasing costs and delaying implementation. The proposed Stipulated Judgment
avoids such challenges by resolving them as part of a GSP Alternative.

¹⁰ See Langridge et al., *An Evaluation of California’s Adjudicated Groundwater Basins 1 (2015)*, available
at https://www.waterboards.ca.gov/water_issues/programs/gmp/docs/resources/swrcb_012816.pdf

1 **1. Sustainable Yield**

2 Under SGMA, a basin’s “sustainable yield” is the maximum quantity of groundwater that
3 can be withdrawn annually without causing an “undesirable result.” (Wat. Code § 10721(w).)
4 Undesirable results are adverse effects caused by groundwater pumping in excess of the
5 sustainable yield, such as chronic lowering of groundwater levels, significant and unreasonable
6 reduction of groundwater storage, water quality degradation, and land subsidence. (Wat. Code §
7 10721(x).) The Judgment initially estimates the Basin’s sustainable yield to be 5,700 acre-feet
8 per year and establishes an adaptive management process with input from the TAC. (*See* NOL
9 Ex. B at pp. 15, 19, 41-42.)

10 The Judgment, incorporating the GMP, provides a roadmap to reach sustainability in the
11 Basin including through projects and management actions. (*See* Driscoll Decl., ¶¶ 29, 31.) The
12 Watermaster will also monitor groundwater levels from a network of monitoring wells and will
13 submit annual and more detailed 5-year reports to DWR that evaluate the success and/or
14 challenges in implementing the physical solution. (NOL Ex. B at pp. 40, 45.)

15 **2. Pumping Allocations**

16 The Judgment controls pumping, the principal management action to achieve
17 sustainability, through the assignment of individual pumping allocations called “baseline
18 pumping allocations” (“BPA”) and annual restrictions/reductions on those allocations. (NOL Ex.
19 B at pp.16-17.) With two exceptions, all pumpers that recently produced groundwater in excess
20 of de minimis quantities of two acre-feet or more are assigned a BPA. (NOL Ex. B at pp. 16-19.)
21 The annual amount of water that each BPA holder can pump is proportionately ramped down
22 annually as a percentage of BPA until the cumulative extractions are equal to the sustainable yield
23 by 2040. (NOL Ex. B at pp. 17-19.)

24 The BPA assigned to BWD is based on a combination of recent historical pumping,
25 “water credits” (discussed below) held by BWD, and an equitable compromise of BWD’s water
26 rights claims. (NOL Ex. B at p. 17). The grants of BPA to private pumpers are based on each
27 pumper’s maximum annual extraction in any one year between 2010 and 2014 based on either
28 metering or estimated groundwater usage based on scientifically accepted methods. (Driscoll

1 Decl., ¶¶ 10, 11.)

2 The grants of BPA to the BWD and some private parties also reflect water credits
3 established under a County/BWD-operated demand management program established prior to
4 SGMA. (NOL Ex. B at p. 17.) BWD issued water credits to groundwater users who permanently
5 fallowed property or accepted BWD service in exchange for pumping forbearance. The
6 Judgment converts these credits to BPA to recognize the voluntary fallowing and reduction or
7 cessation of pumping pursuant to this demand management program. (NOL Ex. B at p. 17.)

8 The two exceptions to the BPA regime are the Borrego Elementary School, Borrego
9 Springs Unified School District (“School District”) and the California State Parks (“State Park”),
10 which operates the Anza-Borrego Desert State Park. Because of their essential public service,
11 these two entities are granted modest allocations sufficient to support their water demands and
12 their allocations are not subject to rampdown. (NOL Ex. B at p. 19.)

13 **3. Governance, Funding, and Continuing Jurisdiction**

14 The physical solution will be managed by the Watermaster. The Watermaster’s Board of
15 Directors will be composed of five members, with one representative each from BWD, County of
16 San Diego, agriculture sector parties, recreational sector parties, and the public/community.
17 (NOL Ex. B at pp. 34-35.) The Judgment also establishes two advisory boards to assist the
18 Watermaster: (1) the TAC that will advise on technical matters; and (2) an Environmental
19 Working Group (“EWG”) that will advise on any environmental implications from basin
20 management decisions. (NOL Ex. B at pp. 41-42.) Assessments on pumping will fund the
21 management and implementation of the physical solution. (NOL Ex. B at pp. 43-44.) Finally, the
22 Court will retain ongoing jurisdiction to ensure adherence to the Judgment and allow for any
23 corrective actions that may be necessary to ensure that the sustainability objectives specified in
24 the GMP are achieved consistent with SGMA’s objectives. (NOL Ex. B at p. 45.)

25 **III. LEGAL STANDARD**

26 Under Section 850, the court may adopt a proposed stipulated judgment over the objection
27 of any non-stipulating party if the proposed stipulated judgment is supported by more than 50%
28 of all parties who are groundwater extractors in the basin or use the basin for groundwater

1 storage, and is supported by groundwater extractors responsible for at least 75% of the
2 groundwater extracted in the basin during the five calendar years before the filing of the
3 complaint (the “50/75% Test”) *and* impose the proposed stipulated judgment on any objecting
4 party, if the objecting party fails to demonstrate, by a preponderance of evidence, that the
5 proposed stipulated judgment does not satisfy one or more criteria described in subdivision (a) of
6 section 850 or that it substantially violates the water rights of the objecting party. (Code of Civ.
7 Proc. § 850(b).) Subdivision (a) of Section 850 provides that a court may enter a judgment in a
8 comprehensive adjudication if the court makes the following findings:

- 9 1. It is consistent with Section 2 of Article X of the California Constitution;
- 10 2. It is consistent with the water right priorities of all non-stipulating parties and any persons
11 who have claims that are exempted pursuant to Section 833 in the basin (i.e., exempted
12 minor pumpers);¹¹ and
- 13 3. It treats all objecting parties and any exempted minor pumpers equitably as compared to
14 the stipulating parties.

15
16 Accordingly, if the 50/75% Test is satisfied, the burden is on any objecting party to show by a
17 preponderance of evidence that the proposed stipulated judgment fails to meet the section 850(a)
18 criteria (above) or that it substantially violates the water rights of the objecting party.

19 The 50/75% Test has been satisfied in this case. BWD provided notice to all persons who
20 have or claim an interest in one or more parcels in the Basin, and/or extract or store water in the
21 Basin, and/or claim rights or interests in the Basin. (*See* Declaration of James Gilpin (“Gilpin
22 Decl.”), ¶ 11.) Pursuant to Section 836(k), upon receipt of the requisite notice, Overlying
23 Landowners interested in the Adjudication had a duty to appear in this action and submit proof of
24 their claims, if any. (Code of Civ. Proc. § 836(k).)

25
26 _____
27 ¹¹ Section 833(d) of the Code of Civil Procedure provides that if the court finds that claims of right to
28 extract or divert only minor quantities of water, not to exceed five acre-feet of water per year, would not
have a material effect on the groundwater rights of other parties, the court may exempt those claimants
with respect to those claims for only minor quantities of water.

1 To date, 48 persons have appeared in the Comprehensive Adjudication, including named
2 Defendants and those who received notice, only 27 of which have been identified as Groundwater
3 Extractors in the Basin. (Gilpin Decl., ¶¶ 11, 13.) Seven parties have signed a Stipulated
4 Appearance for Entry of Judgment in lieu of answering. (Gilpin Decl., ¶ 12.) For the named
5 Defendants who have not appeared, notices for entry of default are being prepared to be filed with
6 the Court in advance of the hearing. (Gilpin Decl. ¶ 14.)

7 BWD retained Trey Driscoll as an expert to review groundwater extractions in the
8 Borrego Valley Groundwater Basin. (Gilpin Decl., ¶ 15.) As part of his work, Mr. Driscoll
9 identified the groundwater extractors in the Basin (“Groundwater Extractors”) and the total
10 volumes of groundwater pumped by each Groundwater Extractor, and specified those pumping
11 more than two acre feet per year from the Basin during the years 2014 to 2019. (*Id.*) Those
12 Groundwater Extractors are identified in Exhibit A attached to his declaration and as Exhibit A to
13 the NOL. (*Id.*)

14 Of the parties who have appeared, 27 are Groundwater Extractors, and of those parties, 18
15 have agreed to support the proposed Judgment. (Gilpin Decl., ¶ 16.) Accordingly, the Judgment
16 is supported by more than 50 percent of all parties who are Groundwater Extractors in the Basin.
17 (*Id.*) A list identifying the appearing parties and whether they are Groundwater Extractors and
18 Stipulating Parties is attached as Exhibit “F” to the Notice of Lodgment. (*Id.*)

19 The estimated amount of groundwater extracted by the Groundwater Extractors over the
20 prior five years is set forth in Exhibit A to the Declaration of Arthur Driscoll and as Exhibit A to
21 the NOL. Based upon the total volumes of groundwater pumped by each groundwater extractor
22 pumping more than two acre feet per year from the Basin during the years 2015 to 2019 as shown
23 in Exhibit A to the NOL, the Stipulating Parties are responsible for at least 75 percent of the
24 groundwater extracted in the Basin during the five calendar years before the filing of the
25 Complaint. (Gilpin Decl., ¶ 17.) Thus, the Court can enter the Judgment based upon finding it
26 satisfies the Section 850(a) criteria unless an objecting party is able to show by a preponderance
27 of evidence, that the proposed Judgment does not satisfy one or more criteria described in
28 subdivision (a) of Section 850 or that the proposed Judgment substantially violates the objecting

1 party's water rights. (Code of Civ. Proc. § 850(b).)

2 **IV. ARGUMENT**

3 Any Party objecting to the proposed Judgment is required to demonstrate, by a
4 preponderance of evidence, that the proposed Judgment does not satisfy one or more criteria
5 described in subdivision (a) of Section 850 and/or that the proposed Judgment substantially
6 violates the water rights of the objecting party. If there are no objecting parties or an objecting
7 party is unable to show by a preponderance of evidence that the proposed Judgment does not
8 satisfy one or more criteria described in subdivision (a) of Section 850 or that the proposed
9 Judgment does not substantially violate the water rights of the objecting party, the Court may
10 impose the proposed Judgment on the objecting party. Although the burden rests on any party
11 objecting to the Judgment to demonstrate that Judgment *does not* satisfy the criteria set forth in
12 Section 850(a), the Stipulating Parties explain below why the Judgment *does* satisfy each of the
13 requisite criteria.

14 **A. The Judgment Is Consistent With Section 2 of Article X of the California**
15 **Constitution.**

16 Section 850(a) first asks whether the Judgment is consistent with Section 2 of Article X of
17 the California Constitution. The constitutional provision “declares the state’s policy to achieve
18 maximum beneficial use of water and prevention of waste, unreasonable use and unreasonable
19 method of use.” (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal. App. 3d 578, 585 [citing
20 Article XIV, Section 3, which was the provision prior to recodification]). In groundwater
21 adjudications, the courts typically adopt a groundwater management plan referred to as a
22 “physical solution” to ensure that the groundwater supply is managed consistent with this policy.
23 (Code Civ. Proc. § 849; *Cal. Am. Water v. City of Seaside* (2010) 183 Cal. App. 4th 471, 474.)
24 Through SGMA, the Legislature established a process and criteria to achieve groundwater water
25 management consistent with Article X, Section 2. (Wat. Code § 10720.5(a).)

26 Water Code section 10727.2 prescribes the mandatory contents of a GSP under SGMA.
27 Critically, the GSP must describe the basin’s sustainable yield. The GSP must set forth
28 management actions that are credibly projected to eliminate undesirable results within 20 years

1 and maintain sustainable conditions thereafter. (Wat. Code § 10727.2.)

2 The Judgment will achieve SGMA’s objectives and more. As discussed *supra* at Section
3 II.D, the Judgment incorporates the GMP, which includes the substantive GSP contents required
4 by SGMA. It also establishes a definitive process to achieve necessary pumping reductions.
5 (NOL Ex. B at pp. 16-17.) Coupled with the prescribed adaptive management process that will
6 refine the sustainable yield, the pumping reductions will ensure that no more water is extracted
7 from the Basin than its sustainable yield by 2040. (*See* Driscoll Decl., ¶ 38.) This will, in turn,
8 prevent all undesirable results and achieve sustainable groundwater conditions within the 20-year
9 period prescribed by SGMA. (*Id.* ¶¶ 37, 38.)

10 The intent of the Judgment is to achieve long-term groundwater sustainability no later
11 than 2040 as required by SGMA. (NOL Ex. B at pp. 21-22.) The Judgment also includes a
12 robust governance structure through the Watermaster with a formal advisory process from the
13 TAC and the EWG, plus assessments on pumping to fund the necessary management and
14 sustainability activities. (NOL Ex. B at Section II.D.)

15 Under the Judgment, the Watermaster will monitor groundwater levels throughout the
16 Basin. (NOL Ex. B at p. 45.) If changes are needed to the management structure to achieve
17 sustainable groundwater management or to address unforeseen circumstances, the Court will
18 retain continuing jurisdiction to attend to such needs. (NOL Ex. B at pp. 46-47.)

19 By fully adjudicating common law groundwater rights, the Judgment also affords a benefit
20 that a standard GSP cannot. A GSP that constrains pumping and imposes costs on pumpers is
21 susceptible to water rights challenges. The Legislature anticipated this potential conflict and
22 addressed it by establishing a process for efficient resolution of such challenges (Wat. Code, §
23 10720.5(c); Code of Civ. Proc. §§ 830 *et seq.*) and allowing a judgment issued in a
24 comprehensive basin adjudication to substitute for a GSP once the final judgment is approved by
25 DWR. (Wat. Code § 10733.6(b)(2).)

26 In this case, the Judgment achieves the truly optimal result: it achieves Basin
27 sustainability and SGMA compliance while also comprehensively adjudicating groundwater
28 rights through a consensual adjudication, thereby avoiding the risk that the management plan for

1 the Basin might be disrupted by a future groundwater rights conflict. In sum, the Judgment
2 affords a complete solution to achieve sustainable management in the Basin consistent with
3 SGMA’s objectives and the commands of Article X, Section 2 in a manner that disposes of future
4 water rights conflicts.

5 **B. The Judgment Is Consistent With Water Right Priorities.**

6 Second, Section 850(a) asks whether the Judgment is consistent with the water right
7 priorities of all non-stipulating parties and any exempted pumpers of minor quantities of water
8 under section 833(d). California water rights and their relative priorities are complex and
9 uncertain. (See Garner et al., *The Sustainable Groundwater Management Act and the Common*
10 *Law of Groundwater Rights—Finding a Consistent Path Forward for Groundwater Allocation*,
11 38 UCLA J. Envtl. L. & Pol’y 163, 166-67, 185-98 (2020).) Absent entry of the Judgment, in a
12 contested adjudication of the groundwater rights in the Basin, the various pumpers would likely
13 mount a broad array of competing claims supported by diverse legal doctrines. Landowners with
14 property overlying the Basin would likely assert overlying rights, which are senior in priority to
15 appropriative rights used by municipal water purveyors like the BWD. (See *City of Barstow v.*
16 *Mojave Water Agency* (“*Mojave*”) (2000) 23 Cal. 4th 1224, 1240.) Among overlying landowners,
17 the overlying rights, which are a form of correlative right, are limited only to the beneficial
18 demands on the overlying property and are unquantified unless adjudicated. (See *Cal. Water*
19 *Service Co. v. Edward Sidebotham & Son, Inc.*, (1964) 224 Cal. App. 2d 715, 725; *Tehachapi-*
20 *Cummings Cty. Water Dist. v. Armstrong* (“*Tehachapi-Cummings*”) (1975) 49 Cal. App. 3d 992,
21 1001-02.) The BWD would claim that its original appropriative rights have ripened into
22 prescriptive rights through adverse pumping during sustained and notorious conditions of
23 overdraft. (See *City of Pasadena v. City of Alhambra* (“*Pasadena*”) (1949) 33 Cal. 2d 908, 926-
24 27; *City of Los Angeles v. City of San Fernando* (“*San Fernando*”) (1975) 14 Cal. 3d 199, 278;
25 *City of Santa Maria v. Adam* (“*Santa Maria*”) (2012) 211 Cal. App. 4th 266, 279.) In addition to
26 contesting the prescriptive rights claim, the overlying owners would surely claim that any loss of
27 right to prescription was restrained by virtue of “self-help” pumping by the overlying landowner.
28 (See *Pasadena*, supra, 33 Cal. 2d at 931; *Santa Maria*, supra, 211 Cal. App. 4th at 279; *Hi-Desert*

1 *Cty. Water Dist. v. Blue Skies County Club, Inc.* (1994) 23 Cal. App. 4th 1723, 1731.) In the
2 present matter, both the BWD and other existing pumpers would likely claim that “dormant”
3 overlying rights (i.e., those that exist as an appurtenant right to land ownership, but that have not
4 been exercised to support overlying pumping in recent years) have been lost pursuant to the
5 doctrine of “subordination.” (*See In re Waters of Long Valley Creek Stream System* (1979) 25
6 Cal. 3d 339 (dissent of Justice Richardson) (“*Long Valley Creek*”); Code Civ. Proc. § 830(b)(7);
7 *Mojave, supra*, 23 Cal. 4th at n. 13.)

8 Finally, the BWD, which serves a community that has been designated as disadvantaged,¹²
9 might also allege less well-settled claims under domestic priority and the human right to water.
10 (*See Wat. Code* §§ 106, 106.3.) The Judgment establishes a fair and responsive solution to these
11 complexities. As an initial and overarching observation, no water right owner can claim an
12 unrestrained right to pump independent of the needs to manage the Basin sustainably as required
13 by SGMA and Article X, Section 2 of the California Constitution. Rather, all rights are limited
14 by this fundamental policy requirement. (*See Mojave, supra*, 23 Cal. 4th at 1241-42.) The law
15 only demands that in developing a physical solution, the courts must adequately consider and
16 reflect the priority of senior water rights holders, and cannot force senior holders to bear a
17 material and an unreasonable expense to make groundwater available to lower-priority users. (*Id.*
18 at 1249-50.)

19 Absent a long, expensive, and uncertain trial of the potential water rights claims
20 summarized above (and possibly others), there is no way to ascertain precisely the relative water
21 right priorities in the Basin. BWD, the School District, the State Park, and the private landowners
22 could each mount reasonable claims based on applicable precedent. The Judgment’s allocation
23 regime, its restrictions/reductions on pumping, and the financial burdens imposed on all pumpers
24 through the pumping assessment reflect a balancing of the competing legal claims that inform
25 water right priorities in the Basin. Notably, allocations between BWD and the overlying
26 landowners are generally based on historical pumping, which is consistent with the divisions

27 ¹² The community is designated as severely disadvantaged under the California Health and Safety Code, as
28 shown in DWR’s online DAC mapping tool. <https://water.ca.gov/Work-With-Us/Grants-And-Loans/Mapping-Tools>

1 between appropriators/prescriptors and overlying landowners ordered by the courts applying the
2 doctrines of prescription and self-help. (*See San Fernando, supra*, 14 Cal. 3d at 269-70;
3 *Pasadena, supra*, 33 Cal. 2d at 931-32.) Further, allocations among landowners based on
4 historical use reflect an approximation of need and equitable claims, and thus are consistent with
5 the division of water supplied among holders of correlative rights. (*See Prather v. Hoberg* (1944)
6 24 Cal. 2d 549, 559-60.) Finally, although dormant landowners are not entirely precluded from
7 pumping—they may apply for de minimis pumper status—the doctrines of prescription and
8 subordination may apply to effectively eliminate pumping rights of landowners that have not
9 recently pumped groundwater in an overdrafted groundwater basin. (*See Santa Maria, supra*, 211
10 Cal. App. 4th at 298; Code Civ. Proc. § 830(b)(7) (authorizing the courts to apply the
11 “subordination” doctrine in a comprehensive groundwater basin adjudication, as originally
12 applied by the California Supreme Court in the surface water context in *Long Valley Creek,*
13 *supra*, 25 Cal. 3d 339.) Thus, in light of the various potentially applicable legal doctrines, it is
14 fair to conclude that the Judgment is consistent with the water right priorities of all parties,
15 stipulating and non-stipulating parties alike.

16 **C. The Judgment Treats All Objecting Parties And Any Persons Who Have**
17 **Claims Equitably As Compared To The Stipulating Parties.**

18 Finally, Section 850(a) asks whether the Judgment treats all objecting parties and any
19 exempted minor pumpers equitably as compared to the Stipulating Parties. This requirement is
20 easily satisfied here, as the Judgment contains no distinctions between Stipulating Parties and
21 others. BPAs are assigned to “Parties.” (NOL Ex. B at p. 16.) “Parties” is defined as “[a]ll
22 persons who hold fee simple ownership in a parcel in the Basin, or Pumps or stores water in the
23 Basin, or that claim any other right or interest in the Basin are subject to the jurisdiction of the
24 Court in this proceeding pursuant to Code of Civil Procedure sections 830 et seq.” (NOL Ex. B at
25 p. 7.) Stipulating parties and other landowners are all “Parties” under the Judgment. The BPA
26 assignments in the Judgment were made on the basis of neutral criteria (e.g., estimated pumping
27 history, water credits, etc.), without any favoritism for the Stipulating Parties. (Driscoll Decl., ¶
28 39.) Likewise, the Judgment allows any landowner Party that presently produces groundwater in

1 quantities less than 2 acre-feet per year to do so under the Judgment as a de minimis pumper, and
2 allows any other landowner Party to apply for de minimis status in the future.

3 **D. Request for Order Directing BWD to Submit Judgment to DWR for**
4 **Approval**

5 If the court enters the Judgment, the Moving Parties respectfully request that the Court
6 order BWD to submit the Judgment as an alternative to a GSP under Water Code section
7 10733.6(b)(2) to satisfy the Basin's SGMA obligations. Although this section allows a public
8 agency like BWD to submit a judgment to DWR for such consideration without court direction,
9 the statute also allows a court to direct a party to do so. The Moving Parties prefer that the Court
10 affirmatively direct the BWD to submit the Judgment to DWR for consideration as an alternative
11 to a GSP, thus exhibiting the Court's affirmative direction to have DWR review and report on the
12 adequacy of the Judgment to satisfy the SGMA objectives.

13 **E. Request for Financial Reimbursement**

14 Pursuant to Water Code Section 10730.2, a GSA that adopts a groundwater sustainability
15 plan may impose fees on the extraction of groundwater from the basin to fund costs of
16 groundwater management, including, but not limited to, the costs of: (1) administration,
17 operation, and maintenance, including a prudent reserve; (2) acquisition of lands or other
18 property, facilities, and services; (3) supply, production, treatment, or distribution of water; and
19 (4) other activities necessary or convenient to implement the plan. Fees imposed pursuant to
20 Section 10730.2 may include "fixed fees and fees charged on a volumetric basis, including, but
21 not limited to, fees that increase based on the quantity of groundwater produced annually, the year
22 in which the production of groundwater commenced from a groundwater extraction facility, and
23 impacts to the basin." (Wat. Code § 10730.2.) Fees may also be imposed to fund the preparation
24 of a groundwater sustainability plan. (Wat. Code § 10730.)

25 In light of the above and pursuant to the Court's powers, the Moving Parties request that
26 the Court order certain equitable reimbursements of the proportionate share of costs incurred by
27 the Stipulating Parties in developing and implementing the physical solution for the Basin from
28 those pumpers that are not Stipulating Parties, but will receive the benefit of a pumping allocation

1 under the Judgment. There are two categories of expenses for which we seek reimbursement.
2 First, the Moving Parties request that the Court order all recipients of BPA to fund the
3 preliminary actions taken to manage the Basin while the adjudication was processed (e.g.,
4 funding of Watermaster and the Basin’s water quality monitoring plan) in proportion to the
5 recipient’s BPA percentage. Because the Stipulating Parties have advanced funding for these
6 activities, the Moving Parties request that the non-stipulating parties be ordered to reimburse the
7 Stipulating Parties so that the expenses are proportionally funded according to comparative grants
8 of BPA. Second, the Stipulating Parties request the Court order all BPA recipients, the State
9 Park, and the School District to reimburse BWD for GSP preparation costs in proportion to
10 proportional allocations granted pursuant to the Judgment. An accounting of these expenses and
11 a proposed reimbursement schedule is set forth in the concurrently filed Declaration of Shannon
12 Smith in Support of Request for Reimbursement of Costs (“Smith Decl.”).

13 These requested reimbursements are appropriate as a matter of equity. (*See Rancho Santa*
14 *Margarita v. Vail* (1938) 11 Cal.2d 501, 560-62 [“It must be remembered that in this type of
15 [water rights] case the trial court is sitting as a court of equity, and as such, possesses broad
16 powers to see that justice is done” and holding “the trial court has full power to make its
17 injunctive order conditional so as to require appellants to bear a portion of the expense”].) It is
18 simply fair that those that will receive valuable pumping rights in the Basin pay their share of the
19 costs of developing and implementing the management plan. Further, the proposed
20 reimbursement expenses are materially lower than those these pumpers would have born pursuant
21 to implementation of a GSP pursuant to SGMA. (Smith Decl. ¶ 8.)

22 **V. REQUEST FOR PRELIMINARY INJUNCTION AS ALTERNATIVE RELIEF,**
23 **FOR INTERIM BASIN MANAGEMENT WHILE OBJECTIONS ARE**
24 **RESOLVED**

25 In the event that an objection to this motion is brought that necessitates an extended period
26 to resolve (which the Moving Parties do not expect), the Moving Parties respectfully request that
27 the Court issue a preliminary injunction order pursuant to Code of Civil Procedure section 847,
28 requiring all parties to adhere to the Judgment’s terms while the objection is being resolved,
including but not limited to maintaining and funding Basin management by the interim

1 Watermaster during the pendency of this action and any appeal thereof. Section 850(b) provides,
2 in part, that an “objecting party may be subject to a preliminary injunction issued pursuant to
3 section 847 while his or her objections are being resolved.” Such relief is appropriate here given
4 the Basin’s long-term overdraft condition, the timing for management prescribed by SGMA, and
5 the general appropriateness of the Judgment’s physical solution as explained above.

6 Such relief is warranted under the statute as the Basin is clearly in a condition of long-
7 term overdraft. (*See* Driscoll Decl., ¶ 25.) Similarly, such relief is necessary to maintain and
8 fund Watermaster management of the Basin during the pendency of this action in the unlikely
9 event of an objection or appeal thereof. SGMA required adoption and implement of a GSP for
10 the Basin beginning in January of 2020. The Stipulating Parties achieved the functional
11 equivalency of these requirements by agreeing to be bound by the Judgment’s terms while this
12 case proceeds and submitting a proposed version of this Judgment to the DWR for preliminary
13 review and feedback. More than 80% percent of pumping in the Basin is already abiding by the
14 Judgment’s terms. Thus, a preliminary injunctive order would ensure that interim Watermaster
15 management efforts continue and eliminate any risk of noncompliance that would harm the Basin.

16 **VI. CONCLUSION**

17 For the foregoing reasons, the Moving Parties respectfully request that the Court enter the
18 Judgment and direct BWD to submit the Judgment as an alternative to a GSP under Water Code
19 section 10733.6(b)(2); order equitable reimbursements of the proportionate share of costs
20 incurred by the Stipulating Parties in developing and implementing the physical solution for the
21 Basin from those pumpers that are not Stipulating Parties, but will receive the benefit of a
22 pumping allocation under the Judgment as specified in Section VII and the Declaration of
23 Shannon Smith in Support of Request for Reimbursement of Costs, or alternatively, in the event
24 that an objection to this motion is brought that necessitates an extended period to resolve (which
25 the Moving Parties do not expect), the Moving Parties respectfully request that the Court issue a
26 preliminary injunction order pursuant to Code of Civil Procedure section 847, requiring all parties
27 to adhere to the Judgment’s terms while the objection is being resolved.

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Dated: March 12, 2021

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Dated: March 12, 2021

By: */s/ Russell McGlothlin*

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T2 HOLDING LLC

Dated: March 12, 2021

JACKSON TIDUS

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OF THE D&J BAUER FAMILY TRUST
11-18-04; JM ROADRUNNER, LLC, a
California limited liability company; SELEY
RANCHES, L.P., a California limited
partnership; SHENANDOAH GROWERS,
INC., a Virginia corporation; GAMINI D.
WEERASEKERA, an individual and owner
and manager of Mountain Springs Organics,
LLC, a California limited liability company;
THE JENSEN FAMILY TRUST DATED
AUGUST 5, 1983; THE SOMMERVILLE
TRUST DATED NOVEMBER 22, 1983;
TRUST A OF THE CONZELMAN FAMILY
TRUST DATED NOVEMBER 22, 1983;
TRUST C OF THE CONZELMAN FAMILY
TRUST DATED NOVEMBER 22, 1983;
MICHAEL C. WARD