Record of the Minutes of the
Beaumont Basin Committee Meeting of the
Beaumont Basin Watermaster
Special Meeting
Wednesday, August 27, 2020

Meeting Location:

There was no public physical meeting location due to the coronavirus pandemic.
Meeting held via video teleconference pursuant to:
California Government Code Section 54950 et. seq. and
California Governor's Executive Orders N-29-20 and N-33-20

I. Call to Order

Chairman Arturo Vela called the meeting to order at 9:09 a.m.

II. Roll Call

City of Banning	*Arturo Vela*	*Present*
City of Beaumont	*Kyle Warsinski*	*Present*
Beaumont-Cherry Valley Water District	*Daniel Jaggers*	*Present*
South Mesa Water Company	*George Jorritsma*	*Present*
Yucaipa Valley Water District	*Joseph Zoba*	*Present*

Thierry Montoya was present representing legal counsel for the Beaumont Basin Watermaster (BBWM). Hannibal Blandon and Thomas Harder were present as engineers for the BBWM.

Members of the public who registered and / or attended:
Jennifer Ares, Yucaipa Valley Water District
David Armstrong, South Mesa Water Company
Hannibal Blandon, Alda
Madeline Blua, Yucaipa Valley Water District
Barbara Brenner, Churchwell White
Bryan Brown, Meyers Nave
Luis Cardenas, City of Banning
John Covington, Beaumont Cherry Valley Water District / Morongo
Allison Edmisten, Yucaipa Valley Water District
Erica Gonzales, Beaumont Cherry Valley Water District
Lonni Granlund, Yucaipa Valley Water District
T. Milford Harrison, San Bernardino Valley Municipal Water District
Jeff Hart, City of Beaumont
Mike Kostelecky, Yucaipa Valley Water District
Jim Markman, Richards, Watson & Gershon
Joyce McIntire, Yucaipa Valley Water District
Greg Newmark, Meyers Nave
John Ohanian, Oak Valley Development Company / Oak Valley Partners

Mark Swanson, Beaumont Cherry Valley Water District
Robert Vestal, City of Beaumont

III. Pledge of Allegiance

Chair Vela led the pledge.

IV. Public Comments:

None.

V. Consent Calendar

It was moved by Member Zoba and seconded by Member Warsinski to approve the Meeting Minutes of the following dates:

1. Meeting Minutes for August 5, 2020, with corrections

AYES:	Jaggers, Jorritsma, Vela, Warsinski, Zoba
NOES:	None.
ABSTAIN:	None.
ABSENT:	None.
STATUS:	Motion Approved

VI. Reports

A. Report from Engineering Consultant – Hannibal Blandon, ALDA Engineering

No Report.

B. Report from Hydrogeological Consultant – Thomas Harder, Thomas Harder & Co.

No report.

C. Report from Legal Counsel – Thierry Montoya, Alvarado Smith

Mr. Montoya advised that a motion will be filed today with the court to add Mr. Hart as a new member and Mr. Vestal as alternate representing the City of Beaumont.

He advised that he met with counsel for YVWD and BCVWD to talk about the agreement and noted he received additional documents from Greg Newmark on Tuesday.

VII. Discussion Items

A. Discussion Regarding Various Legal Memorandums Regarding the Transfer of Overlying Water Rights to Appropriative Rights

Counsel Thierry Montoya reiterated that he met with attorneys Greg Newmark, James Markman and Barbara Brenner. Discussions were professional and open, he reported. He said he is still at the fundamental sticking point regarding water service commitment on behalf of YVWD: making sure the judgment is being adhered to, and when to characterize a water rights change as change in use.

Under the amended judgment, Montoya continued, when an overlying party (OP) transfers its overlying rights to an appropriator (Appropriative Party, or AP) in exchange for water service, the nature and character of the overlying rights change to an appropriative one. The first key issue is that the amended judgment sets forth that change in character in Section 3, Subsection 1 which states that OPs shall continue to have the right to exercise their overlying water rights except to the extent their respective properties receive water service from an AP. The key is the receipt of water service and the water serving the overlying properties. Section 3B, Montoya explained, states to the extent any OP requests water service based on its water rights in Column 4 from an AP, the equivalent volume of groundwater shall be earmarked by the AP which will service the OP up to the volume of their water rights for the purpose of serving the OP. The key is that exchange, Montoya explained; "I have rights, I want water service, when I get the service, it is serving the overlying property."

Section 3C, Montoya stated, indicates when an OP receives that water service, the OP shall forbear the use of the volume of the overlying water right earmarked by the AP. The AP providing that service shall have the right to produce that water to the extent forgone by the OP. The key is that exchange, Montoya opined: the requirement by the overlying party and the AP's agreement to provide water service cinches that forbearance obligation on behalf of the OP.

Previous to the July 20, 2020 agreement, Montoya explained, the Committee did have that transfer consistent with the stipulated judgment. YVWD received a transfer of 180.4 AF of rights based on its Board's acknowledgment that it would provide water service commitments. Montoya said that Board acknowledgement is not what he would consider a traditional will serve letter (WSL), but it serves the purpose. The Committee then received a Form 5 which was written in the future conditional format, "We will provide water service to the OP at some period in time," and Montoya said he talked about his concerns with the language.

Montoya said he was asked to look at the July 20, 2020 agreement. He indicated that he has problems with recitals E and F:

E – Montoya said he does not agree. Form 5 is not a water transfer mechanism, it is a notice provision based on the overlying water rights holder's required offer of water service and the AP's water service commitment to provide the water to the overlying water holder's properties. That process in Sec 3.1 and 3A through C and confirmed by Rule 7 is the key sought here.

F – Montoya said he was asking for evidence as to the YVWD commitment to provide water to the overlying property other than what was reflected in the 180.4 transferred previously. YVWD was asked for documents confirming that YVWD would provide water service in the form of a WSL or Board of Directors water service acceptance letter as previously provided to the BBWM as part of Resolution 2017-02, but those kinds of documentation were not received, Montoya noted.

Montoya noted that his memorandum presumes that no such customary water service confirmation exists. He said he received on August 26, 2020 the Oak Valley Specific Plan Environmental Impact Report and a March 2, 2005 Water Supply Assessment (WSA) for the Oak Valley (OV) development and found a representation that a distillation of the change in character consistent with the judgment – page 12, sec 7.1 – "overlying right holders may have their water rights credited against deliveries made to them by one of the public purveyors serving the OV area, which overlies the basin." Again, he said, it is consistent that if asked, the OP commits to give it. In terms of written confirmation, this is something less traditional but the Board of Directors saying that the District will provide water service cinches the transfer and changes the character from Overlying to Appropriator, Montoya posited.

Also, Montoya continued, he received a Resolution of the YVWD Board of Directors approving the WSA on March 19, 2004 with authorization to initiate the facility master plan for the OV development, engineering studies relative to providing water service for the project, and an August 15, 2007 Summerwind Development Agreement. Montoya opined that the agreement still appears inconsistent with the amended judgment Section 3.3 procedures as reflected in the Beaumont Rules and Regulations Section 7. The key, he said, is that the agreement does not obligate YVWD to provide water service to any or all of OV's overlying properties at either the June 2, 2020 effective date or any time thereafter. The agreement is unclear as to whether an OV water service commitment could ever be effectuated – there is no time limit.

The agreement doesn't state that a certain amount of water is presently committed for the development in upcoming phases and doesn't state that a water service requirement would be coming at any time in the future, Montoya stated. The agreement indicates that YVWD is leasing OV's overlying rights for use in its service areas and standing ready and

waiting for water service commitment to be coming at some time in the future. But that is not a request for water service from OV, Montoya explained.

He outlined his concerns relative to the amended judgment:

1 – An appropriator's water service commitment cinches an OP's forbearance from using that volume of overlying water right earmarked by an AP for water service: Amended judgment Sections 3b and c. This is key, Montoya posited, because the agreement's forbearance by OV provision may be meaningless and revokable absent YVWD's issuance of a WSL or commitment by the Board of Directors to provide water to any or all of OV's property. OV Partners has a statutory judgment right to 1,398.90 AF of overlying water rights and the agreement is ambiguous as to whether OV has obligated itself to transfer all of its overlying water rights to YVWD. It leaves open the possibility that OV could later claim that its forbearance obligations were never triggered under the amended judgment as it never requested service from YVWD and YVWD didn't commit to provide water service to the overlying property., That request and commitment is what cinches the forbearance obligation.

Montoya noted there are dispute resolution provisions included so the parties could be contemplating that there may be a later dispute. But he said his concern is whether the obligation been cinched.

2 – The other concern, Montoya continued, is as it is possible under the agreement that OV's request for water service may come tomorrow, may come years from now, may never come, or when it comes in it is not necessarily clear that it will come in for all of the remaining overlying water rights. This raises an issue of unused water rights and the remaining APs at some time having a claim for their own usage under judgment Sections 3.1.3 and BBWM Rules 7.3.

Montoya pointed out that if water is not put to use for the OP, it will, with time, revert back as water available for other parties; their share dictated by BBWM Rule 7.3. The agreement contemplates that YVWD is going to be leasing the water from OV, putting it to use within their service district and waiting for a request that may or may not come. The amended judgment requires overlying water to be ultimately put to use on the overlying property, not for YVWD use in its district at large. This is not key to the transfer issue, he noted. The agreement's open and unspecified water service commitment deadline is inconsistent with the amended judgment's overlying use requirement and may conflict with the other appropriators' rights to claim some of the water for their own usage, he advised.

Montoya said he could not conclude that this agreement is consistent with the judgment's water transfer provisions as there is no water service commitment being made by YVWD. That raises two corollary issues, he explained: Is there really a forbearance of the overlying water rights? And the unclear timing of the agreement: How long does the BBWM have to wait for a water service requirement to come in? It might not come in, Montoya posited, which at some point is not fair to the other APs who say the unused overlying water rights should be credited to their accounts.

Chair Vela said he appreciated the time spent on the discussion and asked about the anticipated memo.

Robert Vestal pointed to the memo dated July 20, 2020 and said it seems the review with the new documentation is consistent. He requested clarification on the overlier water rights turning into vested appropriator rights. He questioned if the committee would want to see the WSL or WSA detailed in terms of tract map numbers, or would it be able to accept a WSL for the remaining lots of the entire development, which would create a lengthy time until the last tract map is built out.

Montoya said he believes that any appropriator will have obligated themselves to provide water with the issuance of some sort of WSL. The YVWD Board acceptance of the parcel by parcel request for water service suffices, although it is not a traditional WSL. Montoya suggested that at this point, the parties OV and YVWD would at least be able to quantify an amount of water service that would be necessary for the OP. It does not have to be a parcel by parcel designation, he said. The parties would know the status of construction and could at least commit to providing water service up to the remaining balance or a lesser amount within a certain period of time. The parties would know what tranches of what remains of the water could be put to use and could be confirmed by YVWD. None of that was forthcoming, he stated.

The service doesn't have to be consistent with each parcel, Montoya posited; it could be confirmed in some sort of water service commitment in a set period of time that would make sense to the remaining Appropriators.

Member Warsinski suggested a similar process via tract maps.

Chair Vela said he understands the importance of the commitment but that is only one of two conditions that need to be met: the commitment needs to be made, and the water service must be provided. Montoya said the appropriator must merely commit (that is the delivery of water under the judgment, not the actual service).

Chair Vela pointed to a May 15, 2018 memo from Montoya regarding when the overlying right becomes appropriative. It stated there are two conditions for conversion once YVWD would require appropriative rights to provide water service to the OV development: "1. once it commits to do so, and 2. once it begins providing water service to OV's parcels. Once these conditions are met, the OV overlying water rights become YVWD's appropriative rights," Vela read.

Counsel Montoya said he would look it over again. Water service under the judgment and water service consistent with other judgments and case law is just the commitment via a WSL or something along those lines.

Chair Vela questioned that if the water was committed via WSL for the remaining balance of the overlying right, time passes, the development goes under, and an agency says it has a right to that water – for accounting purposes how the watermaster would process that. If it has gone unused for the original purpose, he continued, what would the AP have right to and how far back would it go to exercise that right? Montoya answered that Rule 7.3 talks about overlying water that hasn't been used for a period five years, so that would be the triggering point; the agreement date.

Member Jaggers pointed out the example of Sunny Cal Egg Ranch. BCVWD offered a WSL to Sunny Cal in preparation for annexation. During an EIR challenge, the court found that Sunny Cal had water service to serve their property and therefore was exempt from a water planning study. BCVWD has had an outstanding WSL for quite some time and has processed plans. He said he was unsure as to how to convert their overlying water right to an appropriative water right as far back as those WSLs were issued. The District sets an expiration on WSLs of 12 months to be able to assess the water right activity, he explained. The District may still want some control over when service can be provided based on existing facilities, Jaggers explained.

Jaggers suggested that the Watermaster discuss some of those activities as the memo comes out, because of the existing condition at BCVWD and offering an opportunity to reflect back on the Sunny Cal WSL and begin the conversion process to appropriative rights from overlier rights.

Chair Vela invited public comment.

On behalf of YVWD, Counsel Greg Newmark acknowledged there was a productive set of discussions and exchange of ideas. In Montoya's judgment, Newmark said, it's the request for water service that cinches the forbearance obligation. Those obligations are provided in the agreement as part of the transaction between YVWD and OV. OV was surprised to hear that there is a question as to whether OV has

requested water service, and whether YVWD has committed service. Between the two parties that is clear and is reflected in the recitals of the agreement, Newmark stated.

The agreement states that water service was provided in October 2018 and the nature of the transfer is set forth in the agreement itself, Newmark advised. YVWD considered the water demand that would be required to serve the parcels in the 2005 WSA, he said. The WSA was adopted by Board action: that the project could be and would be served. Relying on that, OV fully entitled the project and has proceeded with construction. A great deal of money has been invested on the strength of the commitment that is being questioned, he noted.

One of the issues may be that YVWD does not issue typical WSLs, Newmark posited, but the long history and documentation should have been sufficient. Once the next memo from Montoya is available, YVWD will be able to provide documentation of the understanding and agreement bet YVWD and OV that service was requested and YVWD has committed, and in fact service has been provided to the parcels, cinching the transfer of rights, Newmark stated.

Counsel Newmark rejected Montoya's point that the transfer provisions in Section 7 and use of the Form 5 does not itself effectuate a transfer, that it is a notice provision. The OV and YVWD submitted Form 5 reflecting their completion of all the predicate actions to have the adjustment of rights and are providing notice and at that point when the BBWM receives the notice, the adjustment is a ministerial act. This is what YVWD is asking for, and believes it is incumbent upon the BBWM upon receipt of the Form 5.

Newmark noted that Montoya is suggesting is that the notice is not effective and the underlying acts have been demonstrated. Form 5 does not actually require that demonstration, he said, and indicated he is not sure it is appropriate to require that sort of proof. Nevertheless, YVWD will be able to provide that, he noted.

Newmark suggested that Montoya's concern that the OP's forbearance is meaningless and revocable creates a risk that if there is an adjustment of rights given to YVWD that the OP could then claim they did not really transfer their right. That is difficult to reconcile with the language of the agreement provided, he said. OV has made an enforceable commitment that it had the authority to transfer, had not encumbered, and did in fact transfer all right, title and interest in its overlying right. Under the agreement, there is zero risk that OV is going to attempt to exercise the rights that it transferred to YWVD, Newmark stated. Covenants physically prevent OV or its successors from physically accessing the water, he explained.

Newmark opined on the concept that that the Appropriator needs to earmark the water that the OP needs to forbear and said there is no doubt about the commitment between OV and YVWD and the agency will provide any further documentation necessary. "But you can't earmark something you don't already have," he noted. All these things need to happen at the same time, he pointed out. The water needs to be in the possession of the Appropriator before anything can be earmarked.

Apparently, Newmark continued, one of the real concerns that is underlying the resistance to making the accounting change that YVWD is entitled to under Form 5, is the distribution of unappropriated water rights under Rule 7.3. The adjustment of water rights provision in the judgment is included to provide the overlying owner with some of the benefit of their property right that the judgment confirms, he advised. It is not intended to provide benefit to the appropriators and he questioned the appropriateness of the redistribution of those unused overlying rights as having any support in the judgment at all. Newmark cautioned the Committee that that concept doesn't really speak to the correct interpretation of the judgment provisions, and it is concerning that it appears to be driving a lot of the decision. He offered to continue to cooperate and offered additional documentation as necessary.

Mr. John Ohanian, Oak Valley Development Company / Oak Valley Partners (OV) told the Committee that developers must rely upon the representations of the Appropriators to have the authority and willingness to serve. Once the letter and agreement is received, developers move forward and spend a substantial amount of money. OV, he said, has built infrastructure on behalf of the District to serve its properties. The transfer should have been done from 2005, based on when pipelines, reservoirs and other facilities were built, he said. It is not just this provision of service – it is a two-way street. The District has entered into contractual obligations to the developer to make certain that the people buying land have service, Ohanian noted. He pointed out that overliers from the beginning have tried to have some voice at the Watermaster Committee and have been thwarted in their requests. The Appropriators have relied on the fragmentation of the overliers and have built up their storage accounts via the benefit of all the water rights, Ohanian posited. But now OV is getting ready to develop its property and must rely on those rights, he stated.

Counsel Barbara Brenner said she appreciates the legal team conversation. She stated that under her review of the materials, her view is consistent with Mr. Montoya's. The conversation is getting lost in the commitment for the water supply vs. when the demand for the water supply is triggered, she said. Looking at Section 7, it is when the actual demand arises that perfects the transfer and when the accounting actually changes accounts. She said she understands that that there is

a commitment for the water supply and no one is questioning that, but when does the demand arise and what is that demand is the key in looking at Section 7.

Member Dan Jaggers said he is surprised that anyone is surprised that there is earmarking going on, and suggested everyone read the discussion on pages 10 and 11 of the judgment about commitments and earmarking, the Urban Water Management Plan that clearly identified the intent to plan for service to those developments, and BCVWD's commitment to serve as well as YVWD's.

Member Warsinski said after hearing the comments from the public and other attorneys his opinion is still where he was at the last meeting. There is probably a path forward, he opined, and concurred with Ms. Brenner who said it was regarding commitments vs. demand. The BBWM Committee is pretty much firm on the commitment related to what YVWD is doing with OV - the Committee is not jeopardizing agreements with builders and is on the same page that YVWD will service these parcels and will get the overlier water rights.

Warsinski pointed out that Beaumont will not receive any of the share of the unpumped overlier water rights so he has no skin in the game, but it is when the water is served – when the demand comes out – that alleviates the issues with Sunny Cal and is more of an accounting function as to when the water goes into YVWDs storage account to serve the parcels within OV, similar to the process in Resolution 2017-02 and subsequent submitting of requirements for water transfers on a tract map basis. He said that's where he is comfortable – not with the water commitment and demand being done at the same time because a WSL was issued.

From an accounting basis, Warsinski continued, how does the Committee deal with an agreement that backdates water service? He pointed to the example of BCVWD and Sunny Cal: in 2004 all water rights were transferred and all of those AF that were split up among the APs would have to be re-accounted for because the overlier water was not pumped.

Chair Vela suggested that the unclear part of Sunny Cal is whether there is documentation that the OP has clear intent to transfer those rights – that is the only missing piece, setting aside the fact that water has not been delivered.

Regarding the development that OV is moving forward, Vela continued, the developer needs to be assured that the BBWM Committee is not debating the availability or the water right, it is trying to agree on the process for transferring the right to the AP.

Members Zoba reiterated the typical phases of water right; it only exists in three phases. He said he will take a closer look at Section 7.3 to see how that is supported in the judgment. He advised that there is an order of precedence in documents between the judgment, Rules and Regulations, and resolutions. He moved to continue this item for further discussion at the October 7 meeting.

Member Jorritsma recalled a similar discussion in 2017. He said he asked a question at that time and was assured the right would be transferred when each individual tract or parcel was actually being served. He said he therefore agrees with Montoya that this would be the proper time to transfer those rights.

Jaggers seconded the motion.

It was moved by Member Zoba and seconded by Member Jaggers to continue this item to the October 7, 2020 Regular Meeting and approved by the following vote:

AYES:	Jaggers, Jorritsma, Vela, Warsinski, Zoba
NOES:	None.
ABSTAIN:	None.
ABSENT:	None.
STATUS:	Motion Approved

VIII. Topics for Future Meetings

a. Development of a methodology and policy to account for groundwater storage losses in the basin resulting from the artificial recharge of water resources.

b. Development of a methodology and policy to account for recycled water recharge.

IX. Comments from the Watermaster Committee Members:

No comments.

X. Announcements

a. The next regular meeting of the Beaumont Basin Watermaster is scheduled for Wednesday, October 7, 2020 at 10:00 a.m.

b. Future Meeting Dates:

i. Wednesday, December 2, 2020 at 10:00 a.m.

ii. Wednesday, February 3, 2021 at 10:00 a.m.

XI. Adjournment

Chairman Vela adjourned the meeting at 10:19 a.m.

Attest:

Daniel Jaggers, Secretary
Beaumont Basin Watermaster