

RESOLUTION NO. 610

**A RESOLUTION OF THE BOARD OF DIRECTORS OF THE
SAN BERNARDINO VALLEY WATER CONSERVATION
DISTRICT ESTABLISHING A GROUNDWATER CHARGE ON THE PRODUCTION OF
GROUNDWATER WITHIN DISTRICT BOUNDARIES,
AND MAKING CERTAIN FINDINGS RELATIVE THERETO FOR FISCAL YEAR 2023-2024**

WHEREAS, California Water Code, Division 21, Part 9 provides authority for the San Bernardino Valley Water Conservation District to consider and impose a groundwater charge on groundwater production within the District; and

WHEREAS, the California Legislature has found, in Water Code Section 75521, that such groundwater charges are in furtherance of District activities in the protection and augmentation of water supplies for users, which are necessary for the public health, welfare and safety; and

WHEREAS, Water Code Section 75523 allows for the use of proceeds from a groundwater charge for any District purposes, which may be authorized by law; and

WHEREAS, The District has presented a budget showing the needs and uses of the Groundwater Charge revenues for 2023-2024 water year; and

WHEREAS, at the regular meeting of the Board of Directors on March 8, 2023, the District approved and accepted an Engineering Investigation report, relating to groundwater conditions in the Bunker Hill Basin underlying the District boundaries; and

WHEREAS, Certain Basin Producers, as well as the District, have formed a Groundwater Council (“GC”), and in connection with that Groundwater Council have entered into the San Bernardino Basin Groundwater Council Framework Agreement (“GC Agreement”), which includes regional cooperation among its member entities to perform an annual review of the needs for, and funding of, various maintenance costs for facilities used to replenish the Bunker Hill Basin, including facilities owned or managed by the District, pursuant to an agreed Equitable Allocation formula developed as part of the GC Agreement. The GC Agreement likewise includes a mechanism for contribution by its member entities toward procuring funds to secure additional imported water supplies for recharge of the Bunker Hill Basin, when such supplies are available, the costs of which are allocated pursuant to a replenishment/sustainability component cost-sharing structure, to recharge additional imported water purchased by the GC; and

WHEREAS, the Preliminary Groundwater Enterprise Budget and rate recommendations were presented to the Groundwater Council on February 27, 2023, and publicly reviewed at the District’s Board meeting of February 8, 2023; and

WHEREAS, the California Supreme Court decision in the case of *City of San Buenaventura v. United Water Conservation District*; Case No. S226036 (“Ventura Decision”) resolved previously outstanding legal issues relating to the procedures and constitutional requirements attending the levy and collection of groundwater charges under applicable authorizing statutes, pertaining to water conservation districts like the District; and

WHEREAS, under that opinion, the California Supreme Court clarified that such groundwater charges are not “property related charges” under California Constitution Article XIII D (Proposition 218), but did affirm that such charges are governed by California Constitution Article XIII C (Proposition 26), such that the charge must be set at a rate that in the aggregate is no more than is necessary to cover the reasonable costs of the governmental activity for which it is charged, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity; and

WHEREAS, the California Supreme Court’s opinion in the Ventura Decision cast serious legal doubt on the continuing validity of the statutory differentials in groundwater charge rates provided under Water Code Section 75594, which dictates that groundwater charges for non-agricultural uses be three to five times greater than agricultural uses; and

WHEREAS, the District in compliance with the procedural and constitutional requirements clarified by the California Supreme Court in the Ventura Decision, shifted its groundwater charge to eliminate differentials in agricultural and non-agricultural uses, having implemented a three-year rate stabilization mechanism to ease the transition of agricultural users, who historically paid lower per acre/foot rates, to a unitary rate that is in line with current legal guidance; and

WHEREAS, the District provided mailed notice to all groundwater producers within its District boundaries of a public meeting held on April 12, 2023, and a public hearing held on April 26, 2023, inviting all groundwater producers and all persons interested in the condition of groundwater or surface water supplies of the District to appear and submit evidence, and inviting all water producers to examine the Engineering Investigation report; and

WHEREAS, the Board of Directors conducted a public meeting on April 12, 2023, and a public hearing on April 26, 2023, to receive comment and evidence submitted by the public at such hearing; and

WHEREAS, the District has made available by wide distribution, beginning on February 8, 2023, a Groundwater Enterprise Budget identifying the proposed use of the estimated Groundwater Charge proceeds, which will be subsequently incorporated in the District budget; and

WHEREAS, the Board has considered the Engineering Investigation report, applicable groundwater enterprise budgets, and considered all comments and evidence presented to it at the public meetings and hearings; and

WHEREAS, the District's ad valorem tax revenues are limited, and the District receives relatively low return in interest on reserves; and

WHEREAS, on the basis of all evidence presented, including the Engineering Investigation report and such public comment, the Board has determined that it is appropriate and in the best interests of the District and all those water users who rely, directly or indirectly, on the District's services, to levy a groundwater charge as further provided herein; and

WHEREAS, pursuant to a request previously received from the GC, the District is continuing within its groundwater charge for the 2023-2024 cycle a Replenishment/Sustainability component, to be imposed on entities subject to the District's Groundwater Charge that are not members of the GC. This Replenishment/Sustainability component is designed to assure that all users of the Bunker Hill Basin who profit from not only the maintenance and operation by the District of groundwater recharge facilities serving the Bunker Hill Basin, but also the acquisition and application to basin recharge of imported and supplemental water supplies funded and secured through the auspices of the GC, contribute ratably, proportionately to those contributions of the members of the GC, toward such efforts, which efforts inure to the benefit of the basin as a whole, and each of its users who benefit from the GC water supply enhancement efforts. The GC supports phasing in this charge over several years; and

WHEREAS, the amount of the proportionate share of non-Groundwater Council member sustainability requirements, and its cost, have been derived from the application of the Equitable Allocation Model utilized by the GC, which takes the production of producers (or their predecessors) over the rolling most recent five-year period, (currently 2017-2021), to weight evenly the considerations of the exercise of historical rights and current production patterns, for the purposes of assigning the costs of imported basin recharge enhancement by the GC, at the imported water rate of \$118.40/acre foot. For non-Groundwater Council members within the District's boundaries, this results in 1,352 acre feet of sustainability need, which amounts to a total water cost of \$160,107. Per the Western Judgment Watermaster, this group of non-Groundwater Council members' production for 2021 was a total of 6,320 acre feet. To assign a per acre foot rate of sustainability cost to actual production, the \$160,107 cost is divided by 2021 actual production from such users, yielding a per acre foot rate of \$25.33; and

WHEREAS, based on this calculation, the Replenishment/Sustainability component charge has been calculated, and is currently \$25.33 per acre foot. Because this represented a substantial one-time increase compared to prior District groundwater charges, this rate component has been, and is being, phased in over a five-year period, increasing 20% per year to allow for transition of payment and budgeting for affected users. As such, the proposed phase-in amount of such charge component is \$12.00 per acre foot to be applicable to the current year's groundwater charge. This amount will be revisited yearly, since groundwater charges are established annually, but the current intention is to have the Replenishment/Sustainability Component increase ratably over a five year period, until the full proportionate rate of \$25.33 is achieved; and

WHEREAS, the \$25.33 per acre foot figure is proportional to the benefit received by non-Groundwater Council members, because it is derived from the amount of production in 2021 of those non Groundwater Council members within the District's jurisdiction of 6,320 acre feet, which when divided by the total Equitable Allocation sustainability need attributable to such users, at 1,352 acre feet and a total cost of \$160,107, yields a per acre foot amount of \$25.33; and

WHEREAS, the Replenishment/Sustainability charge component will not be assessed or collected from those Riverside County producers who extract water from the basin directly under the rights adjudicated in the Western Judgment, *Western Municipal Water District of Riverside County et al. v. East San Bernardino County Water District et al.*, Riverside County Superior Court Case No. 78426, because under that judgment, the allocation of production rights of such users from the basin are fixed, and does not vary with enhanced supplies contributed by the GC or those acting in concert with it. In addition, because to the extent such users are themselves contractors under the State Water Project, and because the GC's imported supplies are secured from the San Bernardino Valley Municipal Water District's State Water Project allocation, such users are contractually precluded from State Water Project purchases from any State Water Project contractor other than their own, and as such, these users do not receive proportionate benefit from the GC's imported water supply enhancement activities.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE SAN BERNARDINO VALLEY WATER CONSERVATION DISTRICT AS FOLLOWS:

Section 1. As required by Water Code Section 75574, the Board hereby makes the following findings:

- A. Annual Change in Storage in those portions of the Bunker Hill Basin lying within the District's boundaries ("Bunker Hill Basin" herein), Fall 2021 to Fall 2022, is a decrease of 71,231 acre-feet or more.
- B. Accumulated Change in Storage in the Bunker Hill Basin as of the Last Day of the Preceding Water Year, June 30, 2022, (using 1993 as base year) is -651,262 acre-feet or more.
- C. Total Groundwater Production from the Bunker Hill Basin from the Preceding Water Year July 1, 2021, to June 30, 2022, is 173,565 acre-feet.
- D. Estimate of the Annual Change in Storage for the Current Water Year (July 1, 2022 to June 30, 2023) in the Bunker Hill Basin is -37,353 acre-feet or more.
- E. Estimate of the Annual Change in Storage for the Ensuing Water Year (July 1, 2023 to June 30, 2024) in the Bunker Hill Basin is -7,025 acre-feet.
- F. Average Annual Change in Storage for the Immediate Past Ten Water Years (2012-2022) in the Bunker Hill Basin is -32,099 acre-feet or more.
- G. Estimated Amount of historically Agricultural Water Withdrawn from the Groundwater Supplies of the District for the Ensuing Water Year (July 1, 2023 to June 30, 2024) is 10,961 acre-feet.
- H. Estimated Amount of historically Other-than-Agricultural Water Withdrawn from the Groundwater Supplies of the District for the Ensuing Water Year (July 1, 2023 to June 30, 2024) is 93,790 acre-feet.
- I. Estimated Amount of Water Necessary for Surface Distribution for the Ensuing Water Year (July 1, 2023 - June 30, 2024) within the Bunker Hill Basin is 72,309 acre-feet.
- J. Estimated Amount of Water Necessary for Surface Distribution for the Ensuing Water Year (July 1, 2023 - June 30, 2024) for the District is 50,684 acre-feet.
- K. The Amount of Water which is Necessary for the Replenishment of the Groundwater Supplies of the Bunker Hill Basin to maintain constant groundwater supplies for the Ensuing Water Year (July 1, 2022 to June 30, 2023) is 136,468 acre-feet.
- L. The Amount of Water which is necessary from all sources, including natural recharge, to bring the basin back to its "full" condition of 1993 is 825,082 acre-feet.

Section 2. The Board of Directors hereby finds that the entire District constitutes a single zone of benefit for the imposition of this charge. The basis for this finding is that the entire portion of the basin underlying the District boundary is fed by the same naturally occurring surface flows. Although the basin may be divided into various subparts, because of hydrogeological conditions these areas are interconnected, and water recharged by the District from its existing recharge facilities contributes to underground "flows" which eventually reach other subparts of the basin. Thus, the District's recharge inures to the benefit of users in other areas by enhancing the availability of water supplies throughout the basin. In addition, the District maintains both the availability of surface water flows for groundwater recharge, and the facilities for accommodating the recharge, whether owned by the District or by other parties pursuant to collaborative regional groundwater management efforts. The District likewise undertakes habitat enhancement and preservation measures, providing an important source of offsetting mitigation land for disturbances occasioned by the maintenance of existing groundwater recharge facilities, and the development of new ones.

Section 3. The Board finds that there is no past accumulation of the amount of water necessary to be replaced in the intake areas of the groundwater basins within the District to prevent the landward movement of salt water into the fresh groundwater body, or to prevent subsidence of the land within the District, either in the past water year or the proceeding 10 years, nor is there likely to be any amount of water necessary for these purposes in the ensuing water year. The Board further finds that the District is not obligated by contract to purchase any water, though depending on the decision-making processes of the GC, and the availability of imported water supplies, the District may be asked to help fund regional purchases of imported water to augment native water supplies, and may contribute proceeds from the collection of the sustainability component of the groundwater charge to securing imported water for recharge of the basin. The Board also finds that further recharge of the basin is required based upon the findings related to change in storage stated in Section 1 above, to prevent depletion or degradation to the basin's groundwater supplies, to enhance both the availability and accessibility of such supplies, and to replenish, augment, and protect such supplies, and that the proceeds of the groundwater charge established herein shall be used for such purposes.

Section 4. The Board of Directors hereby levies, assesses, and affixes a groundwater charge in the amount of \$16.95 per acre foot of water produced, to be applicable to all production (agricultural and non-agricultural use). The Board imposes this unitary rate in response to, and in an attempt to comply with, the Ventura Decision, but also because the District has not historically segregated either facilities or groundwater charge-funded efforts based on agricultural vs. non-agricultural use basis. Nor has the District undertaken studies to isolate a predominantly agricultural producing zone or region within the District boundaries, and even if such an area were to be isolated, there is some question based on existing facts and circumstances whether the benefits and burdens of the District's groundwater management and replenishment services could support a rate differential based on agricultural use. The Board of Directors likewise hereby levies, assesses and affixes a Replenishment/Sustainability component of groundwater charge in the amount of \$12.00 per acre foot of water produced, to be applicable to all production (agricultural and non-agricultural use) by users within the Bunker Hill Basin who are not GC members. Late charges on delinquent accounts will be 1% interest per month in accordance with Water Code Section 75615 et seq. and any additional actual costs to collect delinquent amounts not paid by August 1, 2023, and February 1, 2024.

Section 5. Exemptions:

A. Notwithstanding the foregoing, for producers who can demonstrate that their production for the water year is restricted to basic, personal residential use limited to the property on which the applicable groundwater production facility is based, and the total cumulative production for the applicable producer within the District is not in excess of two (2) acre feet over the course of the water year; such production shall be exempted from the groundwater charge provided the producer documents its exemption prior to semi-annual collection of the groundwater charge. In establishing this exemption, the Board finds that the likely revenues to be derived from the groundwater production subject to the exemption are outweighed by the administrative burdens in administering and collecting the charge. The District General Manager is authorized to waive late fees with explanation and request from payees or if the cost of recovery outweighs the fee to be collected.

B. (1). To the extent that a party who is a member of the GC has paid a maintenance and operation charge through the Equitable Allocation based upon an approved budget for the GC that includes the maintenance and operations costs reflected in the District's budget showing the needs and uses of the groundwater charge for 2023-2024 water year, and such payment is remitted to the District, the General Manager is authorized to accept such Equitable Allocation payment as payment in full for the non-Replenishment/Sustainability component of groundwater charges due from that party's production for the applicable water year. If a GC member remits its Equitable Allocation for maintenance and operation costs to the District, but in that same water year leaves or otherwise ceases to participate in the GC, the District's then-current groundwater charges shall apply to such party's production for the entire water year, and that party's amount of the Equitable Allocation so remitted will be used as a prepayment offset for groundwater charges otherwise due from such party's production. The purpose for this credit is to assure that parties contributing to the maintenance and operations component of the GC Equitable Allocation do not double-pay for their proportionate cost of the District's services.

(2). To the extent that a party who is a member of the GC has paid a contribution for groundwater replenishment/sustainability through the Equitable Allocation based upon an approved budget for the GC that includes the purchase of imported water supplies for replenishment of the basin for 2023-2024 water year, and such payment is remitted to the GC, the General Manager is authorized to credit such Equitable Allocation payment as payment in full for the Replenishment/Sustainability component of groundwater charges due from that party's production for the applicable water year. If a GC member remits its Equitable Allocation for replenishment/sustainability to the GC, but in that same water year leaves or otherwise ceases to participate in the GC, the District's then-current groundwater charges shall apply to such party's production for the entire water year, and that party's amount of the Equitable Allocation apportioned to the GC's replenishment/sustainability activities so remitted will be used as a prepayment offset for the Replenishment/Sustainability component of groundwater charges otherwise due from such party's production. The purpose for this credit is to assure that parties contributing to the GC's replenishment/sustainability component of the GC Equitable Allocation do not double-pay for their proportionate share of such efforts.

C. The District has previously been in discussions with various Riverside County entities who propose to be Ex Officio members of the GC, and who may, by separate agreement with the District, agree to fund portions of the maintenance and operations costs of existing recharge facilities. To the extent such an agreement is reached, and a party otherwise subject to the District's groundwater charge contributes in such a way this its payment is remitted to the District; the General Manager is authorized to provide discharges and credits to such Ex Officio members in the same manner as for Groundwater Council members, provided above. The purpose for this credit is to assure that parties contributing to the maintenance and operations of the District though any such agreement do not double-pay for their proportionate cost of the District's services.

Section 6. In connection with fixing the groundwater charge as set forth in Section 4 above, the Board of Directors makes the following findings:

A. Consistent with the Ventura Decision, the District's groundwater charge is not a "property-related charge" for purposes of determining the applicability of Article XIII D of the California Constitution. Notwithstanding, the District has provided mailed notice of the proposed charge and the amounts proposed to be charged to all known groundwater producers within its jurisdictional boundaries, on February 23, 2023.

B. The groundwater charge is imposed upon the action of extraction of groundwater from the basin underlying the District's boundaries, and not on property or groundwater extraction facilities as such. The groundwater charge will be incurred by groundwater producers through their voluntary action of groundwater production. The groundwater charge is not one for water delivery by the District to groundwater extractors, but rather relates to the District's service of maintaining groundwater supplies, recharge facilities, and management of both for groundwater extractors within the District. The District maintains no pipes, canals or other facilities directly connecting District facilities to the groundwater extractors' property or pumping facilities. In addition, parties subject to the groundwater charge are predominantly either public or private entities involved in the business of providing water, or persons or entities involved in irrigation, for agricultural-related activities, and for uses of water exceeding what would be required for basic residential use of the property.

C. The District has provided notice of the proposal for imposition of the groundwater charge through several different avenues. Mailed notice was provided to all operators reflected on the District's records as containing active groundwater production facilities within the District. In addition, published notice was provided in the San Bernardino Sun and in the Redlands Daily Facts on March 3, 10 and 17, 2023. All such notices identified the prior and proposed rates, the estimated total revenue to be collected from the charge, and the time and place for public hearing at a public meeting at which parties objecting to the charge could appear and be heard. That notice also reflected the rate and method of calculation for this consumption-based charge, which provided notice of the basis of the charge.

D. The proposed groundwater charges, and Engineering Investigation report prepared by the District, were reviewed at a public meeting held April 12, 2023, and a public hearing held April 26, 2023. In addition, the District's Groundwater Enterprise budget was presented to and reviewed with the Board of Directors at a public meeting on February 8, 2023, was discussed at the Groundwater Council on February 27, 2023, and was approved by the District's Board on March 8, 2023.

E. The groundwater charge is being levied to assist in offsetting the costs of the District's Groundwater Enterprise in providing groundwater supplies, groundwater recharge facilities, and recharge management and administration for the benefit of groundwater producers within the District. The Groundwater Enterprise Budget includes, but is not limited to, funding the following:

1. Making available the District's Santa Ana River water rights, in an amount no less than 10,400 acre per feet per year, for recharge into the Bunker Hill Basin;
2. Conducting groundwater recharge activities by diverting both Santa Ana River and Mill Creek water supplies into District's recharge facilities;
3. Applying the District's experience and expertise in directing groundwater recharge effectively and efficiently, administering the physical recharge of groundwater both directly for the District and its water supplies, and recharging on behalf of other entities, including State Project Water and exchanges under the Santa Ana River/Mill Creek Cooperative Water Project Agreement;
4. Maintaining and operating the District's diversion works, recharge basins and canals to ensure the availability of sufficient infrastructure to accommodate needed groundwater recharge; and defense and protection of the District's water rights and manner of operations; and performing such maintenance of other parties' diversion works, recharge basins and canals as requested and per prior agreements.
5. Pursuing various environmental permits and related permissions to continue the maintenance and operation of the District's Facilities for the future and to provide for potential expansion of facilities for Bunker Hill Basin recharge, including the preservation, enhancement, and management of habitat areas;
6. Investigation and implementation of improvements to groundwater measurement and recharge infrastructure;

7. Reporting to groundwater producers and other interested parties of groundwater recharge activities and conditions;
8. Conducting engineering analyses, such as the District's annual Engineering Investigation, designed to provide information regarding the Bunker Hill groundwater basin and the District's groundwater recharge facilities;
9. Participating in, and serving as the accounting arm for the collection of, both facilities maintenance and operations funds and contributions for the GC; and Replenishment/Sustainability funds, for proportionate contribution to import water supply efforts by producers who are not members of the Groundwater Council, but who still benefit from the regional efforts at maintaining Bunker Hill Basin groundwater supplies;
10. Administrative support, training and overhead for all the above-listed activities.

F. The total amount of estimated revenues from the groundwater charge, including the Replenishment/Sustainability component, is estimated at approximately \$1,565,182 based on production reported for the 2022-2023 water year. In addition, the District has been approved by the GC to receive some \$200,000 as pass-through costs for maintenance and upkeep of various GC recharge facilities for a total of \$1,762,228. This amount does not consider offsets as provided in Section 5(b)(1) and (2) above for GC members. The specific total amount of groundwater charge revenues from non-GC members cannot be accurately stated at this time, because the amount of credits for GC member Equitable Allocations are dependent on yearly budgeting by the GC. Based on last year's Equitable Allocation determinations, however, applied to production from the 2022-2023 water year from non-GC members, the estimated groundwater revenues from non-GC members is \$61,044. These revenues do not fully recover expected cost and will not exceed the costs of providing the services as detailed above, in that the District's Groundwater Enterprise Budget for fiscal year 2023-2024 proposes total expenditures of \$2,060,896. The remaining funds are to be paid by the District's capital and groundwater reserves, lease payments from Valley District and Western and Exchange Plan management reimbursements.

G. The amount of groundwater charge paid by each individual payor will not exceed the benefit of the Conservation District's services to such parties, because the structure of the groundwater charge is such that the amount paid varies in direct proportion to the amount of groundwater supplies extracted, and therefore is proportional to the benefit each individual payor receives from the District's services, and the burden each producer puts on the basin, ratably to such user's production.

Section 7. Notwithstanding Water Code Section 75523, and to assure the proportionate benefit of the Replenishment/Sustainability charge between those who pay it and those who are members of the Groundwater Council, all revenues collected by the District from the Replenishment/Sustainability component will be separately accounted for and maintained in a discrete fund by the District, and shall not be commingled with any other District funds or revenues. The proceeds of such Replenishment/Sustainability charge shall be devoted and applied exclusively to Bunker Hill Basin maintenance and water supply enhancement efforts in conjunction with the Groundwater Council, whether by way of direct payment to the Groundwater Council in connection with such efforts, or as directly applied by the District in cooperation with the Groundwater Council toward such efforts.

Section 8. The Board of Directors further finds that the groundwater charge adopted herein is statutorily exempt from CEQA under Title 14, California Code of Regulations Sections 15273, 15301, and 15306. The action contemplated herein constitutes a structuring and establishment of a charge which will be used in part for meeting operating expenses and for purchasing or leasing equipment and materials. To the extent the groundwater charge revenues will be applied to groundwater testing, these activities fit within Title 14, California Code of Regulations Section 15306. Such activities involve the occasional taking of groundwater samples by means of temporary equipment, which will not cause any alteration to the land, and consist solely of information gathering. To the extent any portion of the funds is directed to maintenance, operation, or repair of existing facilities, involving no or negligible expansion of existing uses, these activities fit within Title 14, California Code of Regulations Section 15301. To the extent any portion of the funds is directed to construction or establishment of new facilities, environmental review of such facilities will occur at such time those facilities are proposed, and the nature, location, scope, and function of such potential future facilities becomes known. Under each of the above-referenced exemptions, therefore, the Board of Directors finds that the levy and implementation of the groundwater charge is properly exempt from CEQA.

Section 9. The General Manager is hereby authorized and directed to provide notice to operators of the levy of the groundwater charge, as provided for in Water Code Section 75610.

PASSED, APPROVED AND ADOPTED at a regular meeting of the Board of Directors this 26th day of April 2023, by the following roll-call vote:

YES: 3 DIRECTORS: McDonald, Longville, Raley
NO: DIRECTORS:
ABSTAIN: DIRECTORS:
ABSENT: 2 DIRECTORS: Stewart, Corneille
ATTEST:



Melody McDonald, President



Betsy Miller, Secretary