

To: IWVGA

From: Nick Panzer, IWVWD Residential Customer

Subject: GA Meeting 2/21/19, Agenda Item 2, PUBLIC COMMENT ON CLOSED DOOR SESSION

Date: 21 February 2019

On January 15, 2019, I addressed a question to Mr. Markman (see attached) via your PAC Chair, Mr. Janiec. Yesterday, I received a reply from Mr. Markman (see overleaf<sup>1</sup>) via Mr. Janiec.

Mr. Markman's reply claims that "overlying use" is "constitutionally protected." This implies to me as a layman (I am not a lawyer) that our state constitution has a provision that specifically exempts "overlying use" from the "unreasonable use" limitations imposed by Article X, Section 2 of the constitution, or, alternatively, has a provision that declares all beneficial overlying use "reasonable" within the meaning of Article X, Section 2. If you would be so kind, please ask Mr. Markman to cite for the benefit of all the constitutional provisions that "protect overlying use" from the "unreasonable use" limitations imposed on all water rights by Article X, Section 2. I am not suggesting that such provisions do not exist, I am saying that I have not yet been able to find such provisions in the time available since receiving Mr. Markman's reply yesterday.

In making the above request, I am mindful of Professor Gray's comments (see my January 15, 2019 query of Mr. Markman attached) on the California Supreme Court's ruling in *City of Barstow v. Mojave Water Agency* (2000). Professor Gray writes

Although "water right priority has long been the central principle in California water law, the corollary of this rule is that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use." In crafting a "physical solution" to the problem of aggregate overdraft, the court concluded, a trial court "may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution *without first considering them in relation to the reasonable use doctrine* (emphasis added by Gray)."

I share Mr. Markman's goal of avoiding law suits that challenge the GSP's pumping allocation. Hence, I respectfully request that you append a) my January 15 query of Mr. Markman, b) his reply, and, c) this memorandum to your minutes for this GA meeting and to your website. My intent is to help my fellow rate payers and the general public better understand applicable water law as we work our way through the GSP process. In saying that, I acknowledge and appreciate Mr. Markman's caution that no pumper has an inviolable position when it comes to water rights.

---

<sup>1</sup> Mr. Markman's first sentence incorrectly claims that my idea "would completely deprioritize agriculture." In fact, my idea would completely deprioritize *all* irrigation (including residential irrigation), not just agriculture.

## **Atty Markman on Reasonable Use**

I appreciate Mr. Panzer's persistence in identifying ideas which would completely deprioritize agriculture in the Indian Wells Valley sustainability process. He advocates for his values assigned to various uses of water very effectively. But, in accordance with SGMA, we are constrained to apply the applicable state and federal water rights principles in attempting to bring a negotiated solution to water allocation in the Implementation Plan. And, as stated more than once, I do not believe there is controlling authority which would lead to the application of Mr. Panzer's values priorities in the use of water should litigation ensue. This position first was based on code sections listing municipal and industrial use as a statutory priority over agricultural use. This proposed application of the reasonable use doctrine established in the California Constitution is an effort to support the same position in a related but different way. The Joslin case is an anomaly to me because it is the one case which in a straightforward manner deprioritized a use in favor of protecting a municipal water supply. But that use was the deposition of rocks and gravel on property downstream of a City in a surface water system. The Court did not discuss the nature of the gravel use and really never discussed the applicable constitutional issues. Remember, the riparian use and the overlying use (virtually all of agricultural production in Indian Wells Valley) are constitutionally protected. Many fervent overlying agricultural interests take the position that they have an absolute priority to pump water from a groundwater basin onto their property located in that basin and all municipal pumping is entitled only to water surplus to safe yield. In other words, there are advocates of extreme positions favoring overlying agricultural production as well as municipal production. Also, please note that all parties recognize the Navy's federal reserved right as a priority over all other production. And, de minimis producers have long been left out of the application of adjudication management plans because of the cost of applying administrative provisions to them compared to the basin benefits derived.

I really have to circle back to the first point I made in the first presentation I offered which is that no pumper in the basin (other than perhaps the Navy) has a water right which has no weakness or is invulnerable. Our goal is to create an equitable implementation plan which will not force any group of producers or any one producer to bring suit challenging the pumping allocation made in the plan.

From Nick Panzer to Jim Markman via Dave Janiec, PAC Chair (1/15/19)  
Question: Does this thumbnail sketch reasonably interpret and apply the law to IWV facts?

Article X, Section 2 of the California Constitution is the Cardinal Rule of California water law. It declares that all water rights and all water uses must be reasonable, and that unreasonable uses must be prevented. By making these reasonableness principles “**self-executing**,” the Constitution enshrines them as both a **policy mandate** and a **limitation on water rights**. Moreover, the California Supreme Court, in *Joslin v. Marin Water Agency*, holds that no one has a protectable interest in the unreasonable use of water. Hence, the deprivation of such is not a compensable taking or damaging. (See 2015, *The Reasonable Use Doctrine in California Water Law and Policy*, Chapter 4, Brian E. Gray. Mr. Gray is a Senior Fellow at the Public Policy Institute of California’s Water Policy Center and a Professor Emeritus at the University of California’s Hastings College of the Law in San Francisco.)

Section 10720.1.(b) of California’s Sustainable Groundwater Management Act (SGMA) specifically means to comply with California’s reasonableness principle as summarized above.

**Reasonable use** embraces at least four interrelated concepts (see Gray above).

Utilitarian: The law seeks to encourage relatively efficient, economical, and socially beneficial uses of water. Public water agencies such as Indian Wells Valley Water District, Inyokern Community Services District, and Searles Domestic Water Company, are **utilitarian** by design. We typically referred to such entities as “**public utilities**” for that reason. These entities are publically regulated to ensure that they **efficiently** and **economically** fulfill their primary mission, namely, public health and safety (HS hereafter). In this context, health and safety includes consumption, cooking cooling, sanitation, fire suppression, line flush, and line leakage.

After HS, the next most utilitarian use of water is the Navy Mission. IWV is ideally and uniquely suited to the Navy’s high tech/national defense mission due to the size and utility of its test ranges. Thus, the Navy Mission is far more efficient, economical, and socially beneficial in relation to all uses of water except for HS. That is why China Lake has survived several national military base closures and consolidations, known as Base Realignment and Closure (or BRAC).

Any allocation of water rights that risks public agency access to sufficient water for HS or the Navy mission is **unreasonable**? Two uses of water in the IWV basin fall within this unreasonable category as spelled out next.

Situational: Safe yield is about 7,600 afy. Pumping use in afy looks about like this:

Navy (this could change significantly in time of war)	2,000
HS at home and work for <i>current</i> population of 35,000	4,100
Irrigation at home, work, farm, and municipal	27,900
Searles Valley Minerals industrial process	<u>2,000</u>
	<u>36,000</u>

While all of these uses of water are beneficial, only the first two are **reasonable** in light of safe yield because a) their **utilitarian** value far exceeds that of the latter two uses, and b) they require a full allocation of safe yield to maintain population and still allow a cushion for population growth, Navy demand uncertainty, and climate uncertainty. Our **situation** is such that **irrigation** of any kind (home, business, and farm) and industrial process use of any kind is **unreasonable** in light of the basin's limited safe yield.

Dynamic: What is reasonable/unreasonable changes over time as the economy, technology, demographics, hydrologic conditions, environment, and societal needs evolve. As the scope of the Navy mission evolved and grew beginning in the 1940s, the population grew along with and in support of it. The dynamic of high-tech Navy growth and supporting population growth inverted societal needs over time, rendering other uses of water such as irrigation and industrial process **unreasonable** due to scarce safe yield.

Fragile: What originally may have been a reasonable use of water can become an unreasonable use of water as population grows, and new demands for water arise. Such is the case in IWV. Searles Valley Minerals water imports from IWV beginning in the 1920s were no doubt reasonable, same for small agricultural irrigation beginning about the same time. However, once the base and supporting population growth took off in the 1940s, chronic overdraft followed by the early 1950s. Industrial process use of water and irrigation use of water thus changed from being reasonable to **unreasonable** as China Lake and its supporting population became the most utilitarian use of water in the IWV.

\*\*\*\*\*

## SUMMARY AND CONCLUSION

Indian Wells Valley Groundwater Basin (IWVGB) must reduce pumping by 80% to comply with SGMA. The allocation of that reduction should turn on judicial principles espoused under the state constitution's "reasonableness" principle. Applying that principle to the IWVGB finds that essentially all groundwater uses other than HS and Navy Mission are unreasonable within the meaning of the California Constitution, and should be prevented without compensation.