

**PUBLIC HEARING OF THE BOARD OF MANAGERS  
OF SPECIAL IMPROVEMENT DISTRICT #1  
OF THE RIO GRANDE WATER CONSERVATION DISTRICT  
July 24, 2019, 6:00 p.m.  
Rio Grande Water Conservation District Conference Room  
Alamosa, Colorado 81101**

**Present:** Brian Brownell, President; Carla Worley, Vice-President; Jake Burris Secretary/Treasurer; Jamie Hart, BOM; Miguel A. Diaz, BOM; Sheldon Rockey, BOM; Clay Mitchell, BOM; Chris Miner, BOM; Tony Holcomb, BOM; Asier Artaechevarria, BOM; and Brian David, Ex-Officio.

**Staff and Consultants:** Pete Ampe, Hill & Robbins P.C.; Cleave Simpson, General Manager; Marisa Fricke, Program Manager; Linda Ramirez, Program Assistant; Amber Pacheco, Program Manager; Chris Ivers, Deputy Program Manager; Clinton Phillips, Davis Engineering and April Mondragon, Administrative Assistant.

**Guests:** Kim Cooley, Mike Kruse, Ron Bowman, Clay Corzine, Glen McCoy, Lyle Nissen, Erin Nissen, Greg Higel, Willie Myers, Ron Foriah, Ernie Myers, Craig Miner, Kennon Miner, Lee Crowther, Lawrence Good, David Toews, Kent Price, Roger Mix, Autumn Diaz, Sheena Moran, Les Alderedi, Jim Warner, Dennis Beiriger, James Cooley, Lavern Hart, Deb Sarason, David Hofmann, Dan Davis, Dee Greeman, Dale Bartee, Judith Jolly, Brice Jones, Judy Lopez, Allen Law.

**Meeting Called to Order**

President Brownell called the hearing to order at 6:01 p.m. A quorum was present. The Pledge of Allegiance was recited. *(Copy of the Agenda and proof of publication- attached)*

**Public Hearing**

President Brownell opened up the public hearing.

- ***Aquifer Status:*** Clinton Phillips provided an update on the change in storage, the current aquifer level and the amount of acre feet needed to get to the recovery level. Mr. Phillips also provided the amount of reduced pumping that is needed and the number of sprinklers needing to be reduced.  
*(Copy of the PowerPoint attached)*
- ***Subdistrict No. 1 Program and Budget Overview:*** Marisa Fricke provided the amount of water needed for recovery and updated the Board on the conservation programs. Ms. Fricke highlighted the timeline of the Plan of Water Management and stated the Subdistrict is nearing the half way mark to reach the required aquifer levels. Ms. Fricke updated the Board on the draft budget. Ms. Fricke explained how the variable fee is developed and went over the Subdistrict expenses. Discussion was held on a mandatory reduction and the risk involved with trying to amend the current Plan of Water Management.  
*(Copy of the PowerPoint presented, preliminary budget, memorandum from Mark Steakley and Bill Hillhouse dated April 19, 2018, memorandum from William A. Hillhouse II dated March 20, 2018 and letter from the State Engineer Kevin Rein- attached)*

**Public Comment**

President Brownell asked for public comment. Mike Kruse addressed the Board and commented on the unconfined aquifer and the mandatory reduction idea. Dan Davis provided his comments in regard to the farming practices within the Subdistrict. Ron Bowman questioned the temporary CREP contracts and the effect on the Subdistrict when they expire and come back into production. Pete Ampe stated the Board has had discussions on the temporary conservation programs and will continue to discuss possible solutions. Kent Price asked if the Subdistrict could re visit the Plan of Water Management and change the way it works. Pete Ampe stated time could be an issue as well as the risk of losing the current Plan of Water Management. Mr. Price stated his opinion was the Fallow program is in effective and suggested more programs like the preventive plant. President Brownell commented on cut backs and stated that may be the only way to get where the Subdistrict needs to be. Sheldon Rockey commented on how the RCPP program works and stated some programs allow a cover crop under different circumstances. Glen McCoy thanked the Board for their hard work and suggested raising the variable fee to \$150.

**Board Discussion**

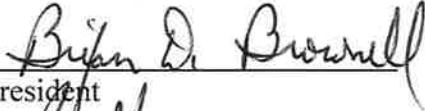
President Brownell asked for Board Discussion. Pete Ampe quoted a section of the current Plan of Water Management regarding paying fees. Carla Worley commented on reduction in pumping and raising the variable fee and the connection to the success of the Subdistrict.

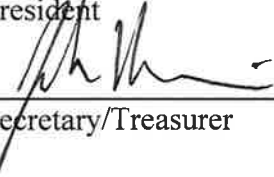
**Next Meeting**

The next meeting will be the Budget Hearing and is scheduled for August 28, 2019 at 6:00 p.m. The next quarterly meeting will be September 3, 2019.

**Adjournment**

The meeting was adjourned at 6:55 p.m.

  
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President

  
\_\_\_\_\_  
Secretary/Treasurer

**Public Hearing of the Board of Managers**  
**Special Improvement District No. 1 of the Rio Grande Water Conservation District**  
**July 24, 2019 at 6:00 p.m.**  
**Rio Grande Water Conservation District Conference Room**  
**Alamosa, CO 81101**

- I. Call to Order
- II. Pledge of Allegiance
- III. Regular Business
  - A. Introduction of Attendees
- IV. Public Hearing
  - A. Aquifer Status: Presentation by Davis Engineering
  - B. Subdistrict No.1 Program and Budget Overview
- I. Public Comment
- II. Board Discussion
- III. Adjournment

**NOTE:** Action may be taken on any or all of these items. The President may move agenda items if it is deemed necessary by the Board. This agenda may be amended up to the time it is approved by the Board.

NOTICE OF PUBLIC HEARING FOR SUBDISTRICT NO. 1 VARIABLE FEE is hereby given.  
The Public Hearing will take place at the Rio Grande Water Conservation District located at 8805 Independence Way, Alamosa, Colorado 81101. Public comment will be considered at the hearing by the Special Improvement District No. 1 on July 24, 2019 at 6:00 p.m.  
Dated June 20, 2019  
Special Improvement District No. 1 of the Rio Grande Water Conservation District  
No. 0888  
Published in the Valley Courier on June 22, 2019.



# Public Hearing Subdistrict No.1

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JULY 24, 2019



Purpose: To discuss current  
Aquifer status, Goals,  
Timelines and Variable Fee



# Aquifer Status: Presented by

Clint Phillips P.E  
Davis Engineering

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## Change in Unconfined Aquifer Storage Study Update

Change for July 2019: +94,455 ac.-ft.

Change between July 2018 & 2019: +55,719 ac.-ft.

Current Aquifer Level: -1,028,857 ac.-ft.

Current 5 Year Average Level: -1,101,341 ac.-ft. (12/1/18)

Acre-Feet needed to get to -400,000 level: 701,341 ac.-ft.



### CHANGE IN UNCONFINED AQUIFER STORAGE WEST CENTRAL SAN LUIS VALLEY



DRAFT - July 10, 2019

Prepared by Davis Engineering Service, Inc,  
For Rio Grande Water Conservation Dist.

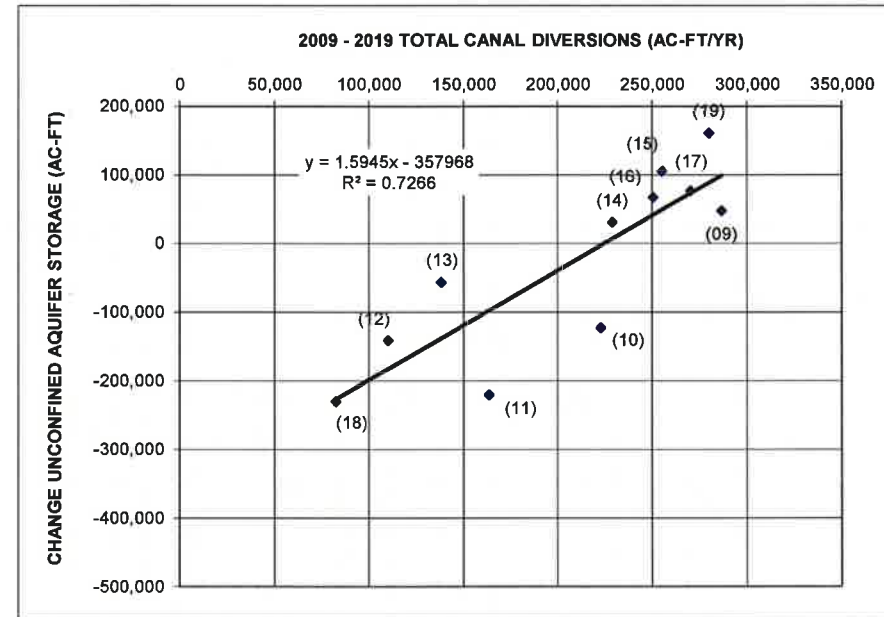


## DRAFT AS OF JULY 2019


PLOTTED DATA		
Last 2-digits Showing	Vertical Axis	Horiz Axis
Near Point	Change in	Total Canal
Irrigation Year	Storage (ac-ft)	Diversions* (ac-ft)
2009	46,940	286,651
2010	-123,446	223,258
2011	-219,984	163,271
2012	-141,862	110,140
2013	-56,855	138,555
2014	30,170	228,800
2015	104,596	255,301
2016	66,859	250,677
2017	76,357	270,523
2018	-230,328	82,296
2019	160,760	<b>280,176</b>
Average		208,150

\* Includes total canal diversions to Study Area from Rio Grande, Farmers Union, San Luis Valley, Prairie and Billings. 2019 Canal Diversions Estimated.

7/1/19 Unconfined Aquifer storage recovery =	63,149 af/yr
63,149 = 1.5945 x - 357968	
x = 264,106 af/yr - needed diversions + reduced pumping	
264,106 af/yr.	
- 208,150 af/yr ( average diversions 2009-2019	
55,956 af/yr (needed reduced pumping)	
<b>No. acres = 55,956 af/yr / 2 ft/yr = 27,978 acres / 130ac/sprinkler = 216 sprinklers</b>	



From chart-Canal Diversions equal to zero change in aquifer storage	224,502	(Ac-ft/yr)
Total Canal Diversions (Ave 2009 -2019)	208,150	(Ac-ft/yr)
Difference	16,352	(Ac-ft/yr)
<b>Acres to be dried up (Sustainability) = 16,352 ac-ft/yr</b>	<b>8,176 acres</b>	

- **Original Analysis (in original POWM) – total of 40,000 acre reduction or ±308 sprinklers**
  - **Analysis completed as of March 2018 –total of 17,536 acre reduction or ±134 sprinklers**
  - **Analysis completed as of December 2018 – total of 38,397 acre reduction or ±295 sprinklers**
  - **Analysis completed as of July 2019 – total of 27,978 acre reduction or ±216 sprinklers**
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# Subdistrict No.1: Programs & Goals

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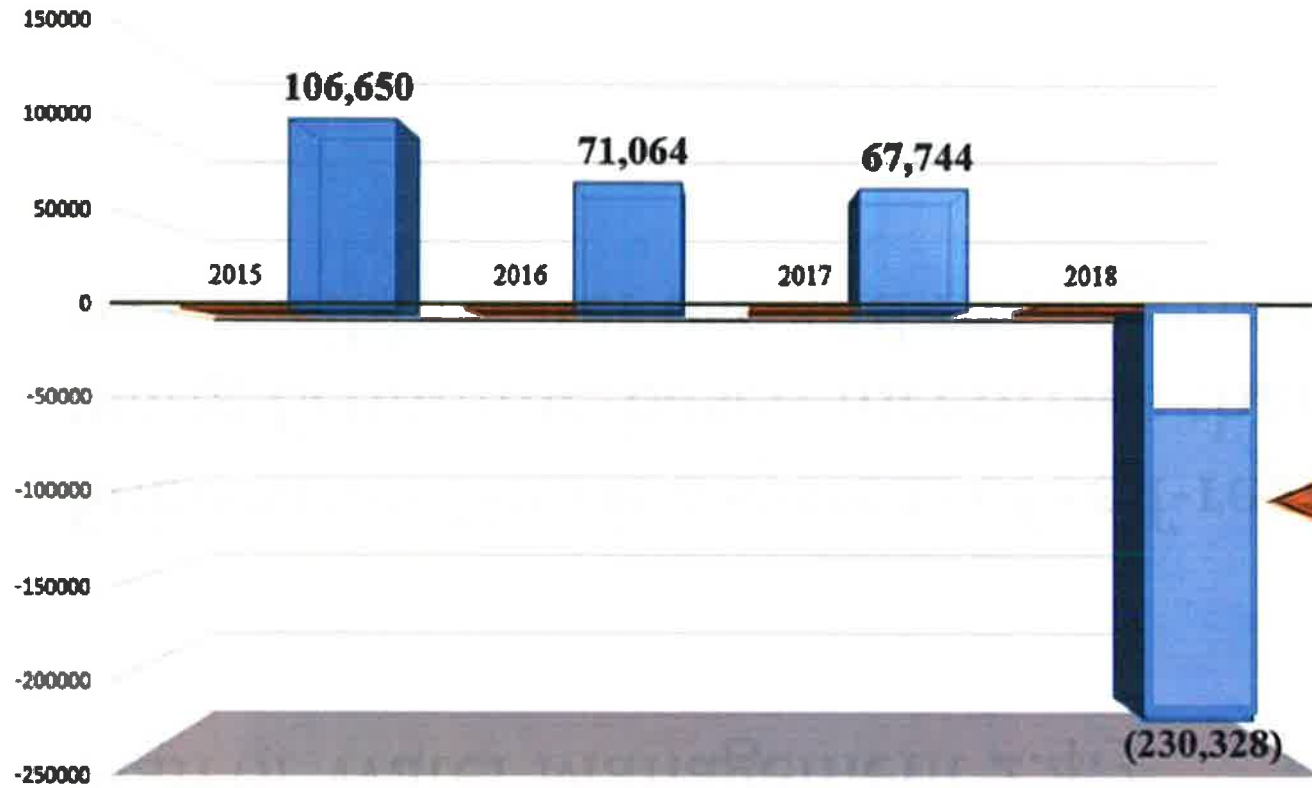


## Plan of Water Management 2.4.3

Subdistrict No.1 is a system of self-regulation using Economic-based incentives that promote responsible water use and management.



### Change in Unconfined Aquifer

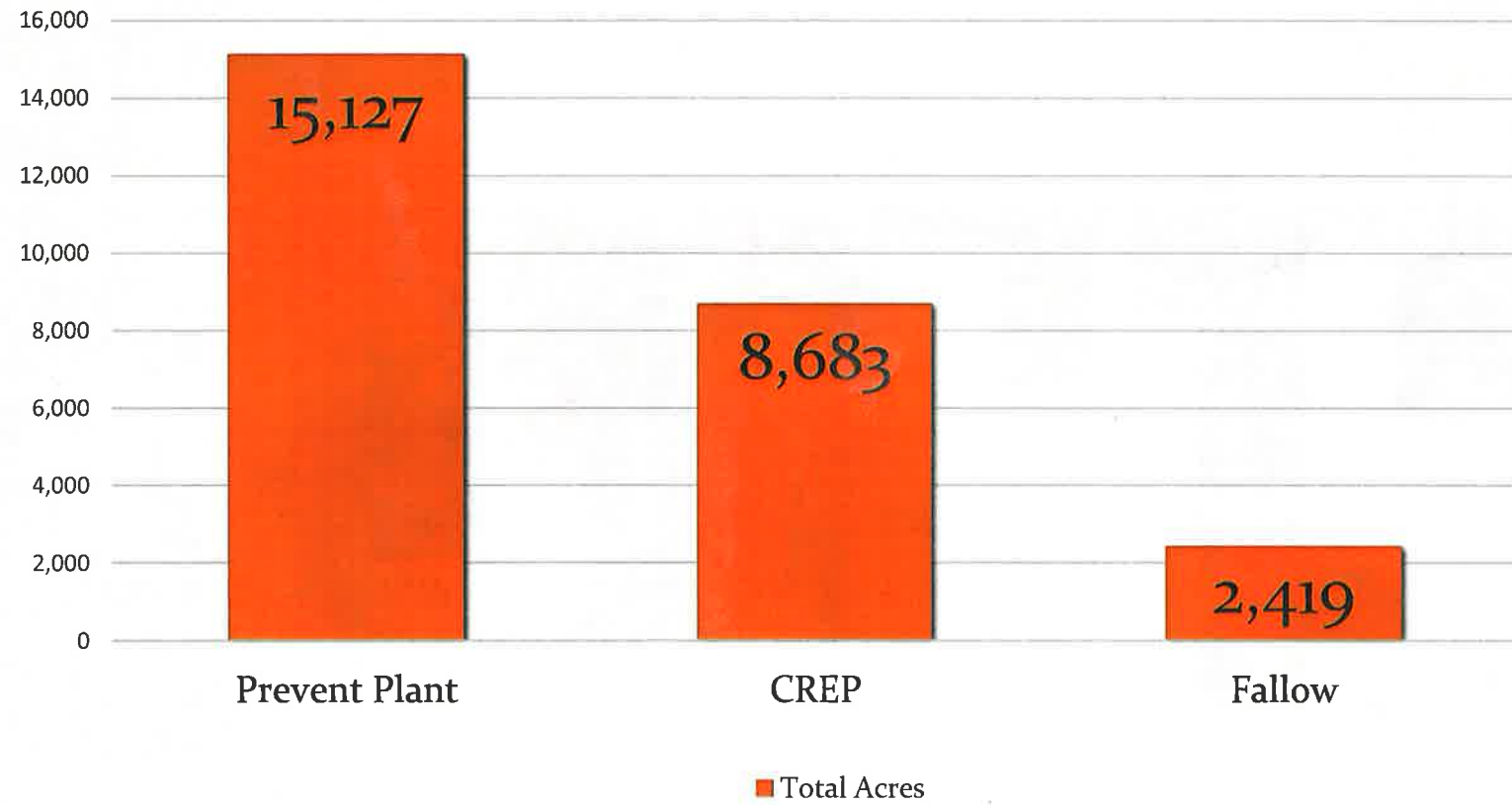


**Approximately  
55,000 Ac. Ft Still  
Needed to  
Recover What  
Was Lost in 2018.**

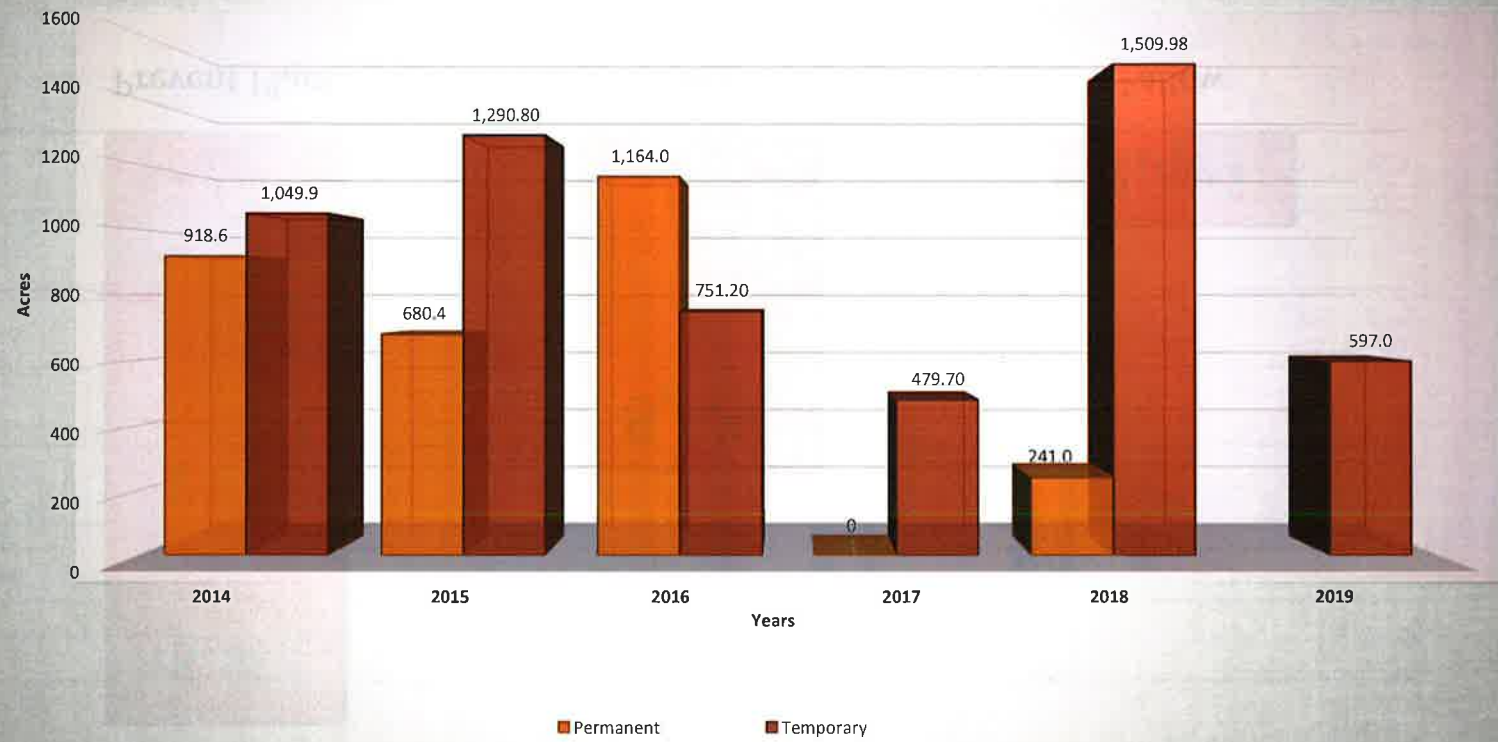
**175,415 ac ft gain\***

*\* amount subject to  
increase or decline*

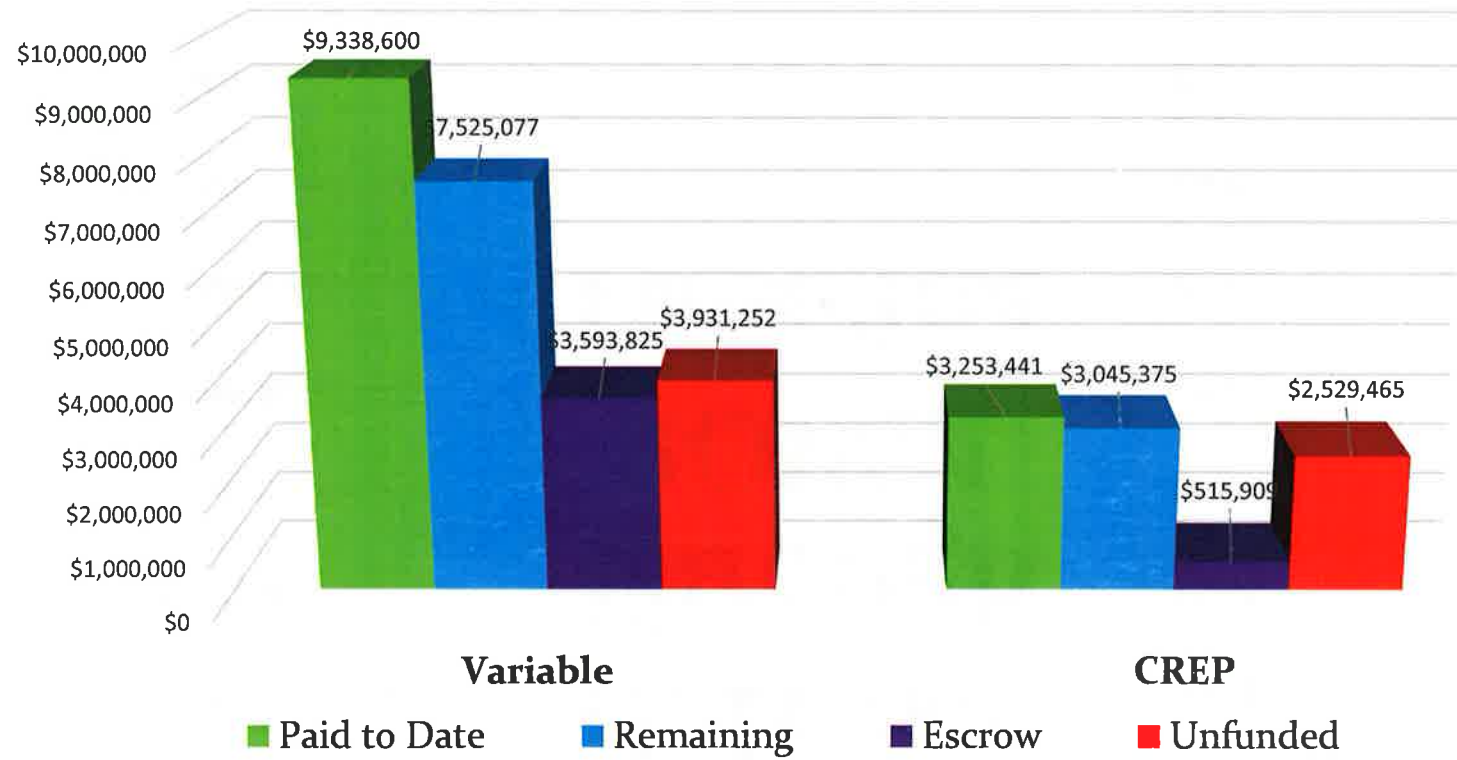
### Conservation Program Acres- 2019



### CREP Enrollment from 2014-Present TOTAL = 8,6823



## CREP Contract Balances





~~2011~~

~~2012~~

~~2013~~

~~2014~~

~~2015~~

~~2016~~

~~2017~~

~~2018~~

~~2019~~

2020

2021

2022

2023

2024

2025

2026

2027

2028

2029

2030

# Halfway Through POWM Timeline



Budget

# Public Comment



Budget Hearing – August 28<sup>th</sup>, 2019

Time: 6:00pm \*TBD



2019 Budget

	CURRENT 2019	Committed	Draft of 2020	Future 2020 Budget to be Collected in 2021		
	Approved Budget	as of 7/8/2019	Assessed in 2019			
	\$ 75	\$ 75	\$ 90	\$ 100	\$ 130	\$ 150
<b>REVENUES: VARIABLE FEES *</b>						
Variable Fee Assessed Pumping	4,959,154.28	4,959,154.28	4,696,434.00	5,218,260.00	6,783,738.00	7,827,390.00
Variable Fee Assessed Pumping with 10% Reduction			4,226,790.60	4,696,434.00	6,105,364.20	7,044,651.00
Variable Fee Assessed Pumping with 20% Reduction			3,757,147.20	4,174,608.00	5,426,990.40	6,261,912.00
Inclusion Contract Fee (well and surface water)	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
<b>Total Variable Fee Revenue</b>	<b>4,960,154.28</b>	<b>4,960,154.28</b>	<b>4,697,434.00</b>	<b>5,219,260.00</b>	<b>6,784,738.00</b>	<b>7,828,390.00</b>
<b>TOTAL-AVAILABLE VARIABLE FEE FUNDS</b>	<b>8,857,817.04</b>	<b>8,857,817.04</b>	<b>5,418,994.3</b>	<b>5,940,820.3</b>	<b>7,506,298.3</b>	<b>8,549,950.3</b>
TOTAL-AVAILABLE VARIABLE FEE FUNDS W/ 10% REDUCTION			4,949,350.9	5,418,994.3	6,827,924.5	7,767,211.3
TOTAL-AVAILABLE VARIABLE FEE FUNDS W/ 20% REDUCTION			4,479,707.5	4,897,168.3	6,149,550.7	6,984,472.3
<b>Difference in Revenue based off of \$90 vs other VF Increment</b>			<b>0.00</b>	<b>521,826.00</b>	<b>2,087,304.00</b>	<b>3,130,956.00</b>
				469,643.4	1,408,930.2	939,286.8
				417,460.8	1,252,382.4	834,921.6
<b>EXPENDITURES: VARIABLE FEES *</b>						
<b>Water Management</b>						
Santa Maria Reservoir Company Contracts	1,230,000.00	1,230,000.00	1,230,000.00	1,230,000.00	1,230,000.00	1,230,000.00
San Luis Valley Water Conservancy District						
San Luis Valley Irrigation District	300,000.00	300,000.00	300,000.00	300,000.00	300,000.00	300,000.00
Forbearance Agreements	250,000.00	250,000.00	250,000.00	250,000.00	250,000.00	250,000.00
<b>CREP - VF</b>						
CREP One Time Signup Incentives	959,154.28	484,472.50	2,000,000.00	2,000,000.00	2,000,000.00	2,000,000.00
CREP - Focus Area	399,277.50	263,377.50				
CREP \$25/acre Additional Gap Incentive	65,000.00	59,170.00	725,000.00	725,000.00	725,000.00	725,000.00
CREP \$50/acre Annual Surface Water Recharge Incentive	600,000.00	606,174.50				
<b>Conservation</b>						
RCPPI-Incentive Grants (funding projects to reduce consumption)	150,000.00	100,000.00	100,000.00			
Research Projects (recharge, agronomy)	50,000.00		50,000.00	50,000.00	50,000.00	50,000.00
Purchase and Expenses for Land and Water Rights	0.00					
Land Fallow Program-incentives paid for temporary,	500,000.00	459,236.00	500,000.00	500,000.00	500,000.00	500,000.00
Appeals	40,000.00	117,145.12	60,000.00	60,000.00	60,000.00	60,000.00
Escrow For Future CREP Payments	3,593,825.00	3,593,825.00				
<b>Total Variable Fee Expenditures</b>	<b>8,137,256.8</b>	<b>7,463,400.6</b>	<b>5,215,000.00</b>	<b>5,115,000.00</b>	<b>5,115,000.00</b>	<b>5,115,000.00</b>
<b>ENDING BALANCE: VARIABLE FEES W/10% REDUCTION</b>			(265,649)	303,994	1,712,924	2,652,211
<b>ENDING BALANCE: VARIABLE FEES W/20% REDUCTION</b>			(735,293)	(217,832)	1,034,551	1,869,472
<b>ENDING BALANCE: VARIABLE FEES</b>	<b>721,560.3</b>	<b>1,394,416.42</b>	<b>203,994.3</b>	<b>825,820.3</b>	<b>2,391,298.3</b>	<b>3,434,950.3</b>



December 17, 2018

Cleave Simpson  
Manager  
Rio Grande Water Conservation District  
8805 Independence Way  
Alamosa, CO 81101

Dear Cleave,

I want to acknowledge certain steps you have taken in the past and, especially steps you have recently taken in an effort to manage the water use in Special Improvement District No. 1 ("Subdistrict"). Specifically, I refer to steps to attain the sustainability goals articulated in the Amended Plan of Water Management ("POWM") for Subdistrict No. 1, amended June 6, 2017. Your continued efforts are critical, given the sustainability goals set out in the POWM and they indicate that the Subdistrict's Board of Managers is focused on ensuring sustainability goals for the Unconfined Aquifer are met.

Section 37-92-502(4)(a)(I), C.R.S., gives the State and Division Engineer authority to administer withdrawals of water from the Unconfined Aquifer: "Use of the confined and unconfined aquifers shall be regulated so as to maintain a sustainable water supply in each aquifer system, with due regard for the daily, seasonal, and long-term demand for underground water;." Based on this legislative directive, the POWM states clear direction on meeting sustainability goals. The POWM recognizes that the current situation of declining water levels in the Unconfined Aquifer is a result of both increased groundwater consumption and reduced water supply caused by sustained drought. However, regardless of the cause, the POWM states that "(i)f the Subdistrict is unable to achieve its goals (regarding the Unconfined Aquifer), then groundwater users face the likelihood that the State of Colorado will impose limitations on the use of their wells through administrative rules and regulations." As the State Engineer, based on my own review of the POWM and in keeping with the direction of the previous State Engineer, I give this regulatory responsibility a great deal of importance. The POWM clearly states that loss of well productivity and the associated impact on irrigated agriculture will continue unless total consumption of groundwater in the Subdistrict is reduced.

In addition to the regulatory direction given in 37-92-501 as identified above, the POWM gives further direction in section 5.1.5 that a benefit of implementing the POWM is to "...avoid state imposed groundwater regulation and the attendant need to have costly plans for augmentation approved by the Water Court as a condition for the continued operation of wells;...". Looking back further to the original Proposed Plan of Water



Management, that plan states that "(I)f the Subdistrict is unable to achieve its goals, then groundwater users face the likelihood that the State of Colorado will impose limitations on the use of their wells through administrative rules and regulations." While this statement clearly states the potential for wells' pumping to be *limited*, I should be clear that the State Engineer's Office would need to consider the very real possibility that to "impose limitations" would actually result in curtailing wells' pumping.

Finally, the Groundwater and Irrigation Season Rules for Water Division No. 3 (Rules) that are currently before the Water Court in Division 3 clearly state in Rule 5.1.4 that "The State and Division Engineers shall also curtail diversions of groundwater so as to maintain a Sustainable Water Supply for each aquifer system, with due regard for the daily, seasonal, and long-term demand for underground water."

It is my objective that the Division Engineer and I are not put in the position of invoking these legal provisions that require curtailing groundwater withdrawals from Subdistrict No. 1 wells. For that reason, I would like to compare the goals with the current status of the Unconfined Aquifer, as I'm sure you have, and state my concern with the trend.

Section 3.4 of the POWM states that the "program objective" is to achieve a sustainable level in the Unconfined Aquifer that is between 200,000 and 400,000 acre-feet below the storage level that was predicted to exist on January 1, 1976. The deadline for achieving that objective is December 19, 2031. That deadline reflects a 20-year period after the original acceptance of the POWM, December 19, 2011.

As I review the data you provide on your website showing the change in storage for the Unconfined Aquifer through the fall of 2018, the long-term downward trend is clear. While there had been an encouraging increase in storage during the last five years, 2018 showed a significant drop back to 1,200,000 acre-feet below the January 1, 1976 baseline ("Baseline"). While this is clearly a direct result of the difficult water year in the Rio Grande Basin, it is, nonetheless a drastic change in the wrong direction. In terms of progress since the POWM was originally signed in 2011, the data shows that the five-year rolling average for the storage in the Unconfined Aquifer has actually gone down by nearly 400,000 acre-feet instead of upward, as was the goal of the POWM.

Looking at the timeline, we are approximately one-third of the way through the 20-year period for attaining the storage objective. The objective called for an increase in storage for the Unconfined Aquifer of 400,000 - 600,000 acre-feet from the 2011 five-year running average storage level of approximately 800,000 acre-feet below the Baseline to the range of 200,000 to 400,000 acre-feet below the Baseline. I believe that was an ambitious, yet attainable goal, requiring an average increase of storage between 20,000 and 30,000 acre-feet per year. With the passage of seven years and the current storage levels, the necessary increase in storage is now about 60,000 - 75,000 acre-feet per year to attain the goal by the 2031 deadline. I do acknowledge that a good water year can create significant gains, allowing the aquifer to make up a lot of ground in storage. However, the data shows that even with those large gains that can be attributed to a one or two-year period, the trend is still downward.

Again, the intent of this letter is to acknowledge the continuous efforts by you and the Board of Managers for Subdistrict No. 1 to reduce withdrawals from the Unconfined Aquifer for irrigation using the steps you've identified in the POWM, but also to strongly encourage you and the Board to make every effort to meet the sustainability goals in the

POWM. The situation is critical, given the trend and the fact that we need to consider that current climatic trends could continue. As I stated, my objective is to allow Subdistrict No. 1 to manage the POWM and attain the sustainability goals and I want to work with you in every way possible to help you achieve that objective. However, I also want to be very clear that if the sustainability objectives of Subdistrict No. 1 are not met as specified in the POWM, the Division Engineer and the State Engineer will be put in the unenviable but required position of curtailing groundwater diversions from Subdistrict No. 1 wells. This curtailment of well diversions could potentially occur even before the end of the 20-year period set out in the POWM if, prior to that time, it is undeniable that the sustainability goals will not be able to be met by the end of the period. The potential mechanism by which this curtailment would occur is the State Engineer's assessment in some year that the goals will not be met and the ARP is, therefore, inadequate. Without an approved ARP, the wells would not have a legal basis under the rules for pumping. Curtailment would follow.

Please contact me if you would like to discuss this further.

Sincerely,



Kevin G. Rein  
State Engineer/Director

cc: Craig Cotten, Division Engineer, Water Division 3



MEMORANDUM

4/19/2018

To: Honorable O. John Kuenhold, Board of Managers of Subdistrict No. 1

Cc: David Robbins, Peter Ampe, Cleave Simpson

From: Mark Steakley and Bill Hillhouse for Farming Technology Corporation, Victor Smith and John McClure for Skyview Cooling Co.

Re: Attaining aquifer sustainability in Subdistrict No. 1 – proposals for consideration

Thank you for your participation in the facilitated discussion on March 30 and 31 about the sustainability issues that we in Subdistrict No. 1 face. We were impressed and pleased with the variety of ideas that were presented and with the breadth and quality of the discussion about those ideas. We also appreciate the opportunity you gave us to think further about those ideas and to offer specific suggestions for your consideration.

We believe that aquifer sustainability is a shared concern for all water users, and for all residents, of the Subdistrict. Anyone who operates a well, whether as a means to apply surface water, as a supplemental source of water supply, or as a primary source of water, has a stake in aquifer sustainability. The depth to water affects the reliability of the physical supply and the cost of pumping for all of us. Moreover, the risk that pumping throughout the Subdistrict may be curtailed if we cannot attain and maintain sustainability threatens all of us with unacceptable economic and social costs. The economy and society that rely upon agriculture in the San Luis Valley are threatened as well. Therefore, it must be our common mission to find a solution.

As Judge Kuenhold noted at the beginning of the facilitated discussion, Subdistrict No. 1 has done a commendable job of replacing harmful stream depletions caused by pumping within the Subdistrict, but its efforts at achieving aquifer sustainability have been less successful. The Subdistrict's 2017 report acknowledges that: "The December 1, 2017 storage value is 733,890 acre-feet below the lowest goal level" set out in the Subdistrict's plan of water management, which has a 2031 deadline. Much less acreage than the Subdistrict hoped has been committed to CREP and other fallowing programs – a primary tool that the Subdistrict has pursued toward sustainability. The plan of water management anticipates that ground water consumption must be reduced in an amount equivalent to retiring 40,000 acres from production, but only 6681 acres currently are under CREP contracts. Again, as Judge Kuenhold noted, it is important to determine why CREP and other fallowing programs have not been more attractive to Subdistrict irrigators and to decide what might be done to make the programs more successful.

We believe that the discussion at the facilitated meeting took two principal directions: what should be done to achieve and maintain sustainability and how should these measures be paid for? Skyview offered spokespersons who emphasized water conservation measures that can reduce the amount of ground water that is diverted and applied to produce a crop, better methods of recharge that can minimize losses in the water used to augment the aquifer, and potential incentives to improve CREP and other fallowing programs. All participants were interested in the issues of how to finance efforts at sustainability, but there was only limited discussion about what the total cost would be. The discussion focused more on what the effect of raising a particular fee, in this case the variable fee, would be on irrigators' behavior and Subdistrict revenues. BOM representatives emphasized that they had not made a decision about what level of fees will be required, but that they seek flexibility to raise the variable fee up to double the current level if circumstances require this.

Against this background, we offer the following thoughts and recommendations. We do not suggest that all of these ideas are new, or that none of them have been considered, at least to some extent, by the Board of Managers. We, however, do suggest that current, careful, fact-based, analysis – and implementation – of these ideas will improve the prospects of achieving sustainability and will advance a cooperative approach among water users within the Subdistrict. The goals should be to achieve aquifer sustainability, but also to do so effectively and efficiently, at a reasonable cost, and in a way that does as little economic damage as possible to farmers and the farming community.

### Proposals

1. The current deadline in the plan of water management for achieving aquifer sustainability has proven to be unrealistic. Notwithstanding vigorous efforts by Subdistrict No. 1, aquifer storage has declined substantially since the 1976 baseline. If 2018 proves to be as dry as feared, there is a real risk that reduced surface water and increased pumping will deplete the aquifer by amounts like those that occurred in the 2002 drought. It may be impossible, even with draconian measures, to achieve aquifer recovery by 2031. Both the 1976 baseline and the 2031 deadline were choices that the Subdistrict made when it formulated its first plan of water management, based upon limited data and imperfect predictions about what could be done to achieve sustainability. We now have years of experience, which have shown that the original choices have not worked as hoped. The Subdistrict's plan of water management suggests that it recognizes that it may not be able to achieve the original deadline. See Paragraph 3.4.5 ("If incremental improvements toward meeting the goal ... have not been achieved no later than ten years following ... a reduction in annual consumptive use of groundwater withdrawals in the amount of 80,000 acre-feet per year has occurred ....") The Subdistrict already realizes that it must amend its plan of water management, and submit that amendment to potential judicial review, in order to change the financing structure. **We recommend** that the Subdistrict also seek to amend the plan of water management to set a new sustainability deadline.

The date requested should be a function of the other analyses discussed in this memorandum, but the extension should be long enough to give the Subdistrict the ability to meet the sustainability goal.

2. As noted, the selection of a 1976 baseline to set the target for aquifer sustainability also was a choice that the Subdistrict made in its plan of water management. The current plan provides that: “the program objective is to achieve the recovery of a Sustainable Aquifer level measured at Unconfined Aquifer storage levels between 200,000 and 400,000 acre-feet below the storage level that was projected to exist on January 1, 1976 ....” In contrast to the dates used to define sustainability in confined aquifers, that target is not required by statute. We understand from Mr. Robbins’ opening remarks that it was chosen because 1976 was the first time that reliable aquifer level data were available and because the aquifer seemed relatively stable during the 1990s, but the target is not immutable if it proves unachievable. **We are not recommending** that the Subdistrict seek to amend the target at this time, but the Subdistrict should be open to this possibility in the future if necessary.
3. The suggestions for achieving sustainability through reducing the consumption of ground water or increasing recharge, or both, appear to rest on the assumption that an acre-foot of decreased pumping or of increased recharge will translate directly to an additional acre-foot of storage in the Unconfined Aquifer. That assumption may or may not be valid. The Unconfined Aquifer is a complex system with complicated interactions with the Confined Aquifer and with the stream system. We know from the extensive RGDSS modeling that the State has done of the relationship between ground water and stream depletions that that relationship is not linear. An acre-foot of pumping does not translate automatically into an acre-foot of stream depletions. For example, the pumping may affect the amount of non-beneficial consumptive use that occurs and the amount of water remaining in aquifer storage. In order to understand how storage in the Unconfined Aquifer is affected by pumping, reduced pumping, recharge, upward leakage from the Confined Aquifer and other factors – and thus to understand which programs can contribute to aquifer sustainability and by how much – we need to know more about how the system works. To date, the State understandably has concentrated on stream depletions in its RGDSS work. To the extent that the modeling has not been done already, **we recommend** that the Subdistrict seek modeling of the Unconfined Aquifer to determine how various programs will affect achieving sustainability.
4. The Subdistrict has relied heavily on CREP and other fallowing programs to encourage people to take lands out of production and to decrease the draft on the aquifer. Such programs are conceptually attractive because they fit with the non-regulatory approach that the Subdistrict has taken in its plans of water management. They rely upon economically driven choices by the participants, who may decide that participation is more attractive than continuing to farm. Moreover, they contribute directly to achieving

aquifer sustainability. These programs, however, have not been particularly successful in Subdistrict No. 1. There was discussion about the reasons for this lack of success, including the perceived inadequacy of the financial incentives to participate and the frustrations of dealing with the delays and red tape of a governmental program. There was little discussion about what can be done to improve the programs, however, except for the report submitted by the economist, Ed Harvey. He suggested that these programs are valuable and cost effective, but that they can be improved, and he made suggestions for what might be done, including use of a CREP program more broadly based and attractive to those with limited or no surface rights. He also suggested how incentives can be evaluated so that these can be set at a level that makes them attractive to farmers. Also reviewed was including less than a full circle in one or more fallowing programs. **We recommend** that the Subdistrict commission an economic analysis of what can be done, and at what cost, to make CREP and other fallowing programs more attractive.

5. Mr. Harvey discussed the benefits of fallowing programs that are non-permanent in nature to allow flexibility for farm ground to again become productive as circumstances allow. For example, if aquifer sustainability is achieved and fallowed lands can again be farmed, such should be allowed to occur. Removal of lands permanently may have pervasive long-term implications. Therefore, without recommending that the Subdistrict never support permanent CREP contracts, **we recommend** that the Subdistrict support the use of fallowing programs that are non-permanent in nature.
  
6. Several of the spokesmen at the facilitated discussion, including Harold Grall from the conservation district in the Texas Panhandle, reported on significant water savings that have been realized through careful monitoring of water application and soil conditions and the use of equipment that minimizes evaporation loss through applying water closer to the plants and with reduced pressures that result in more usable droplets of water rather than a mist. Some of the participants in the facilitated discussion recognized the value of these approaches, and have adopted them already. These sorts of approaches are extremely valuable because they result in less water use (and reduced draws upon the aquifer) without a loss of crop production. **We recommend** that the Subdistrict review the test results of application and recharge efficiencies made available by SWIIM systems, as well as conduct their own testing, and evaluate the effectiveness of these programs, and if the results are positive, encourage the adoption of these approaches through education and financial incentives. For example, the Subdistrict might agree not to raise the fees of well users who adopt these measures. An incentive based program that addresses water savings with credit given against a pumping fee for those farmers that measurably demonstrate a net savings to the aquifer over historical irrigation practices has a benefit to the aquifer and the farmer. For example, assuming the historical average to grow potatoes is 1.6 acre- feet to the acre, but through use and

measurements of water saving efficiencies, the farmer can demonstrate the actual use is only 1.4 acre- feet per acre, this incentive based approach with the 0.2 acre- feet per acre that is saved could be a credit against the variable fee assessment.

7. Mr. Harvey urged the Subdistrict to consider a program tailored specifically to reducing ground water use in dry years. He suggested a leasing program under which the Subdistrict could require the landowner to cease well irrigation in dry years, in return for a higher rental payment in those years. Several people, including Mr. Steakley, commented on why such a program would not work for certain crops, particularly potatoes. No one, however, challenged the premise – and it seems that no one could – that dry years create acute problems that magnify the problem of achieving sustainability in those and following years. This approach may not be appropriate for all; however, if it works for some farmers, it can get us closer to sustainability. **We recommend** that the Subdistrict analyze a variety of ways of dealing with dry years, including but not limited to dry year leasing for some crops.
8. Consistent with the foregoing suggestions, the Subdistrict needs to have – and **we recommend** – a long term (at least ten years) plan specifying what it will do to achieve aquifer sustainability and what it will cost to accomplish this. The current plan – which simply relies upon the sequential reduction of irrigated acres – does not provide the detailed framework of specific actions that the Subdistrict needs to attain aquifer sustainability. We envision that this plan, which should be based upon the analyses suggested in paragraphs 3 – 6 above, and which will provide the time frame for the request suggested in paragraph 1, will provide an overall budget for how the Subdistrict will move forward.
9. **We recommend** that the Subdistrict use a broadly based fee – not the variable fee – to finance its efforts to achieve aquifer sustainability. As we assert above, sustainability is a common problem for all of us, and all of us should contribute financially to achieving it. Ed Harvey asserted during the facilitated discussion that increasing the variable fee is likely to be counter-productive. Well users who are charged more will pump less, thereby reducing the amount of revenue that the Subdistrict receives. Mr. Harvey asserted that, at a price such as \$150 per acre-foot, the growing of some crops – such as potatoes – will become unprofitable. A result that causes farmers to no longer stay in business has negative implications for both the Subdistrict’s revenue base and the community as a whole. Various commenters questioned the particular numbers that he used, but no one challenged the basic principle he articulated. Mr. Harvey might have added that increasing the variable fee is likely to drive up the value of the surface water credit. That result could benefit the owners of surface water who have a surplus in a given year, but it would drive up the cost of operation for well users who buy surface water credits, without increasing revenues for the Subdistrict.

10. The simplest way for the Subdistrict to use a broadly based fee would be to increase the CREP fee, within the already established limits, and apply the revenues to sustainability expenditures. The localized incentive fee for CREP, aside from the 20% federal cost-share, could likewise fall under the CREP fee. If the Subdistrict does not believe that the CREP fee is broad enough to cover all such expenditures, the Subdistrict can seek to amend the plan of water management to broaden the definition. Alternatively, the Subdistrict can amend the plan to create a new sustainability fee, which could be based on total pumping by well users, without offset by the surface water credit. In either case, the variable fee should be reduced so as to offset the cost of additional fees. **We recommend** that the Subdistrict amend its plan of water management so as to permit this use of either the CREP fee or of a sustainability fee.
11. Whatever the chosen fee, the Subdistrict needs to be mindful of the provision in its existing plan of water management that fee increases should be “within the economic means of the irrigators”. Maintenance of a viable economic base benefits the individual farmer, the Subdistrict, and the community as a whole. **We recommend** that the Subdistrict commission an economic analysis of the level at which fees should be capped so as to be “within the economic means of the irrigators”.
12. **We recommend** that the Subdistrict **not** seek an increase in the variable fee to a maximum of \$150 per net acre-foot pumped. Based on their previous experience, well users in Subdistrict No. 1 are concerned that, notwithstanding assurances that they have not decided how much fees should be, the Board of Managers will jump quickly to the maximum allowable. \$ 150 is too high. Moreover, the conditions that the BOM suggests, such as public hearings if it seeks to increase the variable fee beyond a certain amount, do not protect well users the way that the terms of the existing stipulation and the possibility of a court challenge do. Any fee increase – and the maximum that the BOM may request - should be based on the analyses suggested above, changes in aquifer conditions, and the BOM’s conclusions about what revenue it will need to implement its plan. Absent such information, and prior to considering the use of the CREP fee or of a sustainability fee as recommended here, it is premature to set a new maximum for the variable fee.
13. **We also recommend** that the Subdistrict proceed slowly in making incremental fee increases. It may be advisable for the Subdistrict to leave fees where they are until it has the results from the analyses suggested in paragraphs 3 - 6 and has formulated the plan called for in paragraph 7. Alternatively, if there is a more immediate need for revenue, the Subdistrict might be limited to a relatively small increase, such as five dollars per acre-foot, until it has the necessary information to proceed. At that point it can set annual fees in accordance with the provisions of the existing stipulation.

We have worked cooperatively with the Board of Managers in the past in response to challenges to the Plan of Water Management and the first Annual Replacement Plan. We

would like to continue to work cooperatively with the Board of Managers as you seek to amend your plan of water management. If we can reach agreement on modifications to your January 16, 2017 proposal for a budget based variable fee, based upon our suggestions herein, we are prepared to agree not to oppose such an amendment.

**MEMORANDUM**

To: Judge O. John Kuenhold  
From: William A. Hillhouse II for Farming Technology Corporation  
Cc: David W. Robbins, Cleave Simpson, John C. McClure  
Date: March 20, 2018  
Subject: Facilitated discussion re sustainability in Subdistrict No. 1

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Subdistrict No. 1 is facing serious issues about how it will meet the requirement of achieving and maintaining sustainability in the Unconfined Aquifer that underlies the subdistrict. Subdistrict No. 1 proposes<sup>1</sup> to amend its plan of water management to allow an increase in its variable fee, up to \$150 per acre-foot of ground water pumped, less credit for surface water brought into Subdistrict No. 1 from the Rio Grande. When Farming Technology, Skyview Cooling and others questioned whether the proposed variable fee increase provides the best way of dealing with the sustainability issues, the Rio Grande Water Conservation District (“RGWCD”, the parent district for Subdistrict No. 1) and the Board of Managers (“BOM”) for Subdistrict No. 1 agreed to participate in a facilitated discussion of the sustainability issues before former Water Judge O. John Kuenhold, to be held on March 30 and 31, 2018. We appreciate this opportunity.

Judge Kuenhold has asked the entities participating in the discussion to direct him to materials that he should review before the discussion. This memorandum is to present Farming Technology’s view of the issues to be discussed and to refer Judge Kuenhold to relevant documents. The documents are familiar, but electronic copies will be provided in a separate communication to Judge Kuenhold and to the participants in the discussion.

SUSTAINABILITY ISSUES

1. We understand that the RGWCD and Subdistrict No. 1 may concentrate on whether and how the BOM has considered the sustainability issues in developing its proposal for increasing the variable fee. That information should be useful. Farming Technology, however, wants to assure that the underlying issues are discussed as well. These are:

A. How should sustainability for Subdistrict No. 1 be defined?

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<sup>1</sup> The footnotes refer to documents that will be provided separately to the participants in the facilitated discussion. Exhibit No. 1 is the proposed modification to Subdistrict No. 1’s plan of water management, “Budget Based Variable Fee”, dated January 16, 2017.



- B. What are the best measures for Subdistrict No. 1 to pursue in order to achieve and maintain sustainability? Does Subdistrict No. 1 need more time than it currently is allocated to achieve sustainability?
- C. Can sustainability be achieved with Subdistrict No. 1's existing revenue stream?
- D. Can Subdistrict No. 1 tolerate an increase in the variable fee of the sort that the BOM proposes?
- E. If more revenue is required for Subdistrict No. 1 to achieve sustainability, what is the fairest way in which to provide it?
- F. What limitations and conditions should apply to any revenue increase?

## BACKGROUND

### The Sustainability Requirement

2. C.R.S. § 37-92-501 (4)(I) provides that in rules adopted by the State Engineer or plans of water management adopted by a subdistrict:

“Use of the confined and unconfined aquifers shall be regulated so as to maintain a sustainable water supply in each aquifer system, with due regard for the daily, seasonal, and long-term demand for underground water;....”

Sustainability is defined for confined aquifers by reference to historical water pressures, but with respect to unconfined aquifers, such as the one at issue here, the statute does not define sustainability or a sustainable water supply and says only that:

“Unconfined aquifers serve as valuable underground water storage reservoirs with water levels that fluctuate in response to climatic conditions, water supply, and water demands, and such fluctuations shall be allowed to continue; ....”

Section 37-92-501 (4)(II).

3. In adopting its first approved plan of water management<sup>2</sup>, Subdistrict No. 1 chose to define sustainability generally: “‘Sustainable Aquifer’ generally refers to a condition where withdrawals from the aquifer match recharge to the aquifer so that mining of the aquifer is not occurring”. In setting a more specific goal, the plan deals with sustainability by reference to water levels in the Unconfined Aquifer in 1976. The goal is to:

Reduce total consumption from irrigation well withdrawals with the objective of increasing Unconfined Aquifer storage within 20 years to a

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<sup>2</sup> Exhibit No. 2: Official Plan, June 15, 2009.

level between 200,000 and 400,000 acre-feet below the storage level that existed on January 1, 1976. It is anticipated that to achieve sufficient reduction of well withdrawals to accomplish the Unconfined Aquifer storage goal, dry-up of approximately 40,000 acres of land previously irrigated during calendar year 2000 will be required.

Exhibit No. 2, pp. 15-16. Unconfined Aquifer storage is calculated on a five-year running average.

4. It is notable that Subdistrict No. 1 was not required to adopt the particular definition of sustainability that it did. The definition, however, was accepted by the Water Court<sup>3</sup> and by the Colorado Supreme Court.<sup>4</sup> While it would be possible for the Subdistrict to amend its plan of water management to include a new, less stringent, definition of sustainability, we think that this probably is not an acceptable way in which to proceed unless it is determined that the current definition simply cannot be met.
5. On June 6, 2017, Subdistrict No. 1 adopted an amended plan of water management.<sup>5</sup> The amended plan takes an approach to sustainability that is generally the same as the approach in the originally approved plan. The amended plan, however, puts more emphasis on reducing groundwater consumption rather than just on reducing irrigated acreage. Section 3.4.3.3 provides that the subdistrict will:

reduce total consumption from irrigation well withdrawals with the objective of increasing Unconfined Aquifer storage within 20 years to a level between 200,000 and 400,000 acre-feet below the groundwater storage level that existed on January 1, 1976. It is anticipated that to accomplish the Unconfined Aquifer storage goal, a reduction in consumptive use of groundwater withdrawals of up to 80,000 acre-feet per year, the approximate equivalent of the dry-up of up to approximately 40,000 acres of land previously irrigated during calendar year 2000, will be required.

6. Subdistrict No. 1 has committed to meet its sustainability objective by December 19, 2031, with incremental targets at December 31 of 2016, 2018 and 2021. See Exhibit No. 5, Section 3.4.4. Section 3.4.5 further provides that:

If incremental improvements toward meeting the goal for Unconfined Aquifer storage have not been achieved no later than ten years following the period of time in which up to 40,000 acres of annual dry-up or a reduction in annual consumptive use of groundwater withdrawals in the amount of 80,000 acre-feet per year has occurred, the Board of Managers shall adjust the program of fees and charges, within the economic means of the irrigators, in order to provide funding to obtain a further reduction in groundwater consumption during the subsequent years or to take such other steps that may be required to make measurable progress toward the goal(s).

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<sup>3</sup> Exhibit No. 3: May 27, 2010, Findings of Fact, Conclusions of Law, Judgment and Decree

<sup>4</sup> Exhibit No. 4: 270 P.3d 927 (Colo. 2011)

<sup>5</sup> Exhibit No. 5. The amended plan was approved by the State Engineer on October 16, 2017.

7. Certainly Subdistrict No. 1 has not yet met the sustainability objective, and there is no assurance that it will be able to do so by 2031. In addition to the uncertainty associated with climatological conditions, there are other unknowns. For example, will the aquifer respond in a linear fashion to a reduction in groundwater consumption, or as is the case with stream depletions caused by groundwater withdrawals, will the response be affected by other factors? Trying to achieve sustainability is a new element in Colorado water law, peculiar so far to Water Division No. 3. It could be necessary to set the target farther in the future than 2031.

#### Nature of the Problem – Physical

8. In the spring of each year Subdistrict No. 1 proposes an annual replacement plan (“ARP”) to implement the plan of water management. Following the conclusion of the irrigation season, the subdistrict then provides an annual report on the implementation of the ARP. Among other things, the annual report includes a graph of Unconfined Aquifer storage, depicted on an annual and a five-year running average basis. The report for 2017<sup>6</sup> provides a recent picture of where the Subdistrict stands with respect to its sustainability goal. Despite some improvement over the past several years, as of December 1, 2017, Subdistrict No. 1 is 733,890 acre-feet below the lowest aquifer storage goal level. See Exhibit 6, Figure 12.1.
9. Figure 12.1 shows that aquifer levels fell most drastically during the drought of the early years of the twenty first century. Fundamentally, aquifer levels decline when outflows, including aquifer depletions caused by well pumping, are greater than inflows, including water diverted into Subdistrict No. 1 from the Rio Grande, the return flows from which recharge the aquifer. Table 1.4 of the 2017 report shows that well withdrawals increased dramatically during the drought. “Net groundwater consumptive use” in 2000 was 213, 180 acre-feet; in 2002, it was 322, 490 acre-feet, and in 2003, it was 234,308 acre-feet. Net groundwater consumptive use is defined as groundwater withdrawals less recharge from Rio Grande surface water diverted through Subdistrict No. 1 canals. These numbers compare with a 2001-2017 average of 88,215. Further, according to Table 1.3 of the 2017 report, net groundwater consumptive use averaged 42,560 acre-feet between 2012 and 2017, and in two of those years, the recharge exceeded the groundwater consumption.

The structure summary report for the Rio Grande Canal<sup>7</sup> shows that 71,828.17 of the 72,887.59 irrigated acres under that senior canal were irrigated by wells in 2002.

The inescapable conclusion is that groundwater withdrawals were extraordinarily heavy during the drought when the aquifer decline occurred.

10. The streamflow and diversion records for the early 2000s provide the other half of the picture. The flows in the Rio Grande at Del Norte were only 164,035.45 acre-feet in

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<sup>6</sup> Exhibit No. 6: February 27, 2018 Annual Report for the 2017 Plan Year..

<sup>7</sup> Exhibit No. 7: Structure summary report, Rio Grande Canal

2002 and 311,431.32 acre-feet in 2003, compared with an average annual flow of 644,449.8 acre-feet.<sup>8</sup> The Rio Grande Canal, a senior water right on the Rio Grande diverted only 22,394 acre-feet in 2002 and 66,664 acre-feet in 2003. These numbers contrast with the average annual diversions by the Rio Grande Canal of 170,268 acre-feet over 67 years with diversion records.<sup>9</sup>

11. The physical stream flows and diversions available to the water users in Subdistrict No. 1 during this period were drastically less than normal. It is no surprise that well diversions skyrocketed to replace the surface water that was not available. The lack of surface water, of course, produced a “double whammy” for sustainability: well diversions went up and the recharge from surface rights went down.
12. In summary, the primary cause of today’s sustainability issue is severe historical hydrology. Mother Nature, rather than today’s well users, and specifically those who have little or no surface water, is to blame for the historic drought. Nonetheless, the Subdistrict’s proposal would put the burden of overcoming the drought on current well users by increasing the variable fee.

#### Nature of the Problem – Institutional

13. Because Subdistrict No. 1 is a subdistrict of the RGWCD, its formation and operation are governed by C.R.S. § 37-48-101, et seq. Under Section 37-48-123, a petition for formation of the subdistrict is filed with the District Court.

The petition shall include a general description of the methods proposed to finance the proposed works and plans, including the acquisition, construction, maintenance, and operation thereof, with sufficient detail to enable a property owner within the proposed subdistrict to know whether the proposed methods of financing would result in the imposition of a lien or charge upon the taxable or assessable property within the subdistrict and the amount thereof and to know further that such proposed methods of financing would be authorized without further election by the signing of the petition by the requisite number of petitioners to authorize the creation of the subdistrict.

C.R.S. § 37-48-123(2)(e)(1).

Also, “If it is anticipated that a plan of water management, plan of augmentation, or both will be adopted for the subdistrict, the petition shall describe such plan or plans in general terms....” C.R.S. § 37-48-123(2)(g).

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<sup>8</sup> Exhibit No. 8: Rio Grande River near Del Norte, CO. See also the monthly streamflow gage provided as Exhibit No. 9.

<sup>9</sup> Exhibit No. 10: Structure summary report for the Rio Grande Canal – diversion summary.

The RGWCD filed a petition with the District Court.<sup>10</sup> The petition included a proposed plan of water management.<sup>11</sup> The Court ordered the formation of the Subdistrict on July 19, 2006.<sup>12</sup>

14. When Subdistrict No. 1 adopted its first approved plan of water management<sup>13</sup>, notwithstanding its statement in the plan submitted with its formation petition, it did not seek the authority – as some subsequently formed subdistricts have done<sup>14</sup> - to limit well withdrawals. Instead, Subdistrict No. 1 chose to rely upon economic incentives to encourage people to limit their use of groundwater. Subdistrict No. 1 adopted the policy that those who have larger net groundwater consumptive use will pay higher fees.<sup>15</sup>
15. Subdistrict No. 1 currently has three different fees. There is an administrative fee, limited by the plan of water management to a maximum of \$5 per acre; a “CREP fee”, limited to \$12 per acre; and a “variable fee”, limited to \$75 per acre-foot of groundwater withdrawn, less credit for recharge from water imported into the subdistrict from the Rio Grande under recognized recharge decrees.<sup>16</sup>
16. If a well user has more recharge than groundwater withdrawals, that operator is entitled to a “surface water credit” for the difference.<sup>17</sup> Surface water credits may be, and are, sold in private market transactions, which allow the purchasers of such credits to reduce the variable fee that they otherwise would pay. The result is a financial benefit for the seller of the surface water credit, and most likely for the purchaser as well, but no reduction in groundwater use and no benefit to the aquifer. Furthermore, because the transaction reduces the variable fee that the purchaser otherwise would pay, the Subdistrict receives less revenue. According to the 2017 report, the “amount of Surface Water Credit (SWC) exchanged both 2016 and 2017, between Farm Units and applied against the 2017 Variable Fees was 18,360.86 ac-ft.”<sup>18</sup>
17. In practice, Subdistrict No. 1 has relied disproportionately on the variable fee. According to the 2017 proposed budget<sup>19</sup> and a March 13, 2018 communication<sup>20</sup> from Cleave Simpson, RGWCD Manager, the administrative fee recently has been set at \$1.50 or \$2.00 per acre and the CREP fee at \$2.00 per acre, both well under the

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<sup>10</sup> See Exhibit No. 11: Petition For Establishment of Special Improvement District No. 1 of the Rio Grande Water Conservation District.

<sup>11</sup> Exhibit No. 12: Exhibit D to Petition, dated May 12, 2006.

<sup>12</sup> See Exhibit No. 13: Order Establishing Special Improvement District No.1, Case No. 2006CV64. 13.Exhibit No. 2.

<sup>14</sup> See, e.g., Exhibit No. 14: February 2, 2016 Conceptual Plan of Water Management for Special Improvement District No. 3 (Conejos Response Area).

<sup>15</sup> See Exhibit No. 5, § 3.1.2.3.

<sup>16</sup> Exhibit No. 5, §§ 4.5, 4.6.

<sup>17</sup> Exhibit No. 5, § 4.1.2.

<sup>18</sup> Exhibit No. 6, § 4.0.

<sup>19</sup> Exhibit No. 15: 2017 proposed budget.

<sup>20</sup> Exhibit No. 16: Memorandum from C. Simpson.

maximums allowed by the plan of water management. For 2017, the administrative fee is budgeted to produce \$599,313.66, and the CREP fee is budgeted to produce \$629,359.19. With respect to the variable fee, however, after briefly setting the fee at \$35 per net acre-foot of groundwater withdrawn, the BOM jumped to the maximum of \$75 and has remained at that level since then. At \$75 per acre-foot, the variable fee is budgeted to produce \$6,225,624.77 in 2017.

18. With the current level of fees, the Subdistrict is able to meet its obligation to replace injurious stream depletions caused by groundwater withdrawals.<sup>21</sup> Moreover, before 2017, the Subdistrict generated an overall budget surplus of \$ 4.9 million.<sup>22</sup> Most of this was attributable to a large surplus in the variable fee account.
19. To date, Subdistrict No. 1 has relied primarily on CREP and other following programs to encourage farmers to reduce their irrigated acreage. These programs, however, have been only partially successful. According to the 2017 report <sup>23</sup>, 6681 acres are currently in CREP; of that acreage, however, only 2,585 acres are permanently retired.
20. Subdistrict No. 1 pays the local cost share for the CREP program, using the CREP fee. The Subdistrict also pays additional incentives<sup>24</sup> to encourage people to participate in CREP. The incentives are paid from proceeds generated by the variable fee. In 2017, according to the annual report, the Subdistrict's incentive and annual payments were approximately \$995,708. It is unclear why the Subdistrict does not use the CREP fee – which is based upon irrigated acreage – rather than the variable fee – which is based upon net groundwater withdrawals – to pay for CREP incentives beyond the local cost share. Before the approval of its plan of water management, Subdistrict No. 1 entered into a stipulation<sup>25</sup> with Farming Technology and others, which set budget requirements that now are expressed in Appendix 4 to the plan of water management<sup>26</sup>. Among other things, the appendix authorizes the use of the CREP fee to pay for incentives.

“The total CREP Fee charged by the District or Subdistrict for a given year shall be limited to the amount shown by specific items in the budget as needed to fund the local cost share components of a CREP Program designed to retire land in the Subdistrict and to fund any additional incentive payments related thereto.”

19. In 2017, the Subdistrict purchased the West Medano Ranch for approximately \$3.995 million. It is estimated that using the associated surface water rights for recharge may benefit the aquifer by approximately 2,140 acre-feet, based on a five-year average through 2017, although the amount will vary depending upon stream run off in a

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<sup>21</sup> Exhibit No. 6, ¶ 7.0.

<sup>22</sup> Exhibit No. 15.

<sup>23</sup> Exhibit No. 6, ¶ 9.1.

<sup>24</sup> Exhibit No. 17: SD#1 Current Cash Incentives for CREP 01/18/2018.

<sup>25</sup> Exhibit No. 18: October 20, 2008 Stipulation between Rio Grande Water Conservation District, Farming Technology Corporation and the Skyview Parties.

<sup>26</sup> Exhibit No. 5, Appendix 4.

given year. The aquifer also should benefit from the elimination of potentially 600 acre-feet of annual groundwater withdrawals.<sup>27</sup>

20. Purchases of lands and the associated water rights obviously is an expensive undertaking. The Subdistrict proposes to raise additional revenue by increasing the variable fee.
21. Because the Subdistrict's maximum fees are set by its plan of water management, any increase in the fees must be accomplished by amendment to the plan of water management. That process requires a public hearing, review and approval by the State Engineer and potential judicial review. Similarly, other changes in the Subdistrict's approach to achieving sustainability may require amending the plan. Therefore, the content of the amendment that the Subdistrict will seek, and the degree to which it reflects the suggestions of the water users within the Subdistrict, are critical to the success of the process.

#### ANTICIPATED PRESENTATIONS

22. The plan of water management deals explicitly with when and how the BOM may seek to increase fees to achieve sustainability. This may occur after the 20 year period provided for in the plan if the specific measures designated in the plan have not fully succeeded. Even then, the fee increase must be within the water users' ability to pay - specifically well users with little or no surface water, if a requested increase in the variable fee is involved.

If incremental improvements toward meeting the goal for Unconfined Aquifer storage have not been achieved no later than ten years following the period of time in which up to 40,000 acres of annual dry-up or a reduction in annual consumptive use of groundwater withdrawals in the amount of 80,000 acre-feet per year has occurred, the Board of Managers shall adjust the program of fees and charges, within the economic means of the irrigators, in order to provide funding to obtain a further reduction in groundwater consumption during the subsequent years or to take such other steps that may be required to make measurable progress toward the goal(s).<sup>28</sup>

23. Therefore, the threshold question, if any increase in fees is permissible now, is what the effect of an increase in the variable fee – potentially a doubling under the BOM's proposal – would be on water users and others in the Subdistrict. Would it exceed their "economic means"? Those speaking will address this issue. Farming Technology's representative is expected to be Mark Steakley. He will be available to discuss, among other things, Farming Technology's operations – extensive potato growing and shipping, what the company pays now in fees to the Subdistrict and what the effect of an increase in the variable fee would be for Farming Technology. He will make various substantive and procedural suggestions for the BOM to consider.

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<sup>27</sup> See Exhibit No. 16, Memorandum from Cleave Simpson dated March 13, 2018, ¶ 5c.

<sup>28</sup> Exhibit No. 5, plan of water management, §3.4.5.

24. It is anticipated that Skyview's representatives will address the impact of raising the variable fee and actions that the Subdistrict could take to meet sustainability requirements without increasing fees.
25. Should more revenue be required, Farming Technology and Skyview representatives will address what fee structure would be fairest and most appropriate and what conditions and limitations should apply to any proposed fee increase.