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**VIA EMAIL (APRILN@IWVWD.COM)**

Indian Wells Valley Groundwater Authority (“IWVGA”), Board of Directors  
c/o April Keigwin, Clerk of the IWVGA Board  
500 W. Ridgecrest Blvd.  
Ridgecrest, CA 93555

RE: Comments on Agenda Items 7, 9, 10–12, and 14

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, “Mojave”) we provide comments on the following items on the Board Agenda for January 21, 2021: (i) Agenda Item 7 (Groundwater Sustainability Plan Section 5.3 – Project No. 2 IWVGA Recycled Water Program); (ii) Agenda Item 9 (Board Review and Approval of 2021 IWVGA Budget); (iii) Agenda Item 10 (Board to Receive and File the 2018-2019 Financial Audit); (iv) Agenda Items 11 and 12 (Capitol Core Group 2019 – 2020 After Action Report and Board Review and Approval of Contract Extension with Capitol Core Group); and (v) Agenda Item 14 (Board Consideration and Approval of Acceptance Letter for Participation in Transient Pool Program).

**I. Agenda Item 7: Groundwater Sustainability Plan Section 5.3 – Project No. 2 IWVGA Recycled Water Program**

We object to the proposal to authorize the Recycled Water Use Alternatives Analysis (“Analysis”) because the Analysis “will be funded through the Replenishment Fee.” (Jan. 21, 2020 Staff Report for Item 7, p. 2.)

As you know, the IWVGA Board has excluded Mojave from receiving an annual pumping allocation made available to other water users, including IWVGA Board members Kern County, the City of Ridgecrest, the Indian Wells Valley Water District. The IWVGA Board has also excluded Mojave from receiving a Transient Pool allotment. Any water pumped by Mojave is therefore subject to the Replenishment Fee. Accordingly, through its Replenishment Fee payments, Mojave is being asked to foot the bill for the Analysis.

The problem with imposing on Mojave the duty to fund the Analysis is that the IWVGA Board excluded Mojave from receiving any benefit under the Recycled Water Program and Option Agreement. Both arbitrarily, and without support, exclude Mojave and other farmers. The Option Agreement, among other things, excludes farmers from receiving recycled water, limiting the use of recycled water for “municipal or industrial uses either located within the City [of Ridgecrest] or for the direct benefit of the citizens of the City.” Likewise, Mojave does not qualify as a “Program Participant” under the Recycled Water Program.

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The IWVGA cannot legally require Mojave to fund a program from which it has been excluded, the sole purpose of which is to benefit other water users. This scheme is contrary to law because it enforces the collection of a fee from non-program participants in violation of the California Constitution. (See, e.g., Cal. Const., Art. XIII D, Sec. 6, subd. (b)(3) [“The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.”]; (b)(4) [“No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. . . .”].)

For the same reasons, the Replenishment Fee should not fund the Analysis to the extent it will evaluate the provision of recycled water under the Recycled Water Program to the City of Ridgecrest, the Navy, or other parties not subject to the Replenishment Fee. (See Jan. 21, 2020 Staff Report for Item 7, p. 2 [The Analysis will consider “the City’s and the Navy’s future commitments to applying recycled water (including Navy golf course irrigation and habitat maintenance for the nearby endangered Mojave Tui Chub).”].) Neither the City nor the Navy is subject to the Replenishment Fee. Therefore, the constitutional provisions cited above prohibit use of the Replenishment Fee to fund a service ultimately provided to the City or the Navy.

Unless and until these issues are rectified, the IWVGA should not authorize the Analysis.

## **II. Agenda Item 9: Board Review and Approval of 2021 IWVGA Budget**

We reincorporate our December 16, 2020 comments on the 2021 IWVGA budget. Further, prior to adoption of the 2021 IWVGA budget, the following issues need to be clarified:

- The “GSP Development” budget should be clarified to explain whether the “Assessment Pumping Fee” refers to the Extraction Fee.
- The “Administration” budget should be modified to specify which tasks will be funded by “Extraction Fee Revenue” and which tasks will be funded by “Replenishment Fee Revenue.” As you know, the IWVGA Board adopted these two fees under two separate statutes (Water Code sections 10730 and 10730.2), which limit the types of expenses that may be funded by each fee. The IWVGA must demonstrate that it is appropriate to fund the proposed expenditures with one fee or the other.
- For the reasons explained in Section I, above, the line item for “Optimize Use of Recycled Water” should be deleted from the “Replenishment” budget. The Replenishment Fee can only be used to fund the Recycled Water Program where all Replenishment Fee payors (and only the Replenishment Fee payors) benefit from the program. (See, e.g., Cal. Const., Art. XIII D, Sec. 6, subd. (b)(3), (b)(4).)

## **III. Agenda Item 10: Board to Receive and File the 2018-2019 Financial Audit**

We urge the IWVGA to adopt the recommendations set forth in the auditor’s “Schedule of Findings and Responses for the Years Ended December 31, 2019 and 2018.” We also renew our requests that the IWVGA begin adhering to accountancy best practices and immediately form a Finance Committee to increase fiscal oversight and transparency. Poor reporting hampers the public’s ability to understand how their fees and tax dollars are being spent. The need for transparency is heightened by the IWVGA’s fee structure, which totally or partially exempts members of the IWVGA governing body from payment of the Replenishment Fee, thereby disincentivizing careful agency oversight of expenditures funded by the Replenishment Fee.

#### **IV. Agenda Items 11 and 12: Capitol Core Group 2019 – 2020 After Action Report and Board Review and Approval of Contract Extension with Capitol Core Group**

As explained in our prior comments dated October 29, 2020 and December 16, 2020, we believe it is premature for the IWVGA to begin “active pursuit of further water supplies,” as recommended in the report for Agenda Item 11 and therefore urge the Board to decline to fund “Task 1 – Identify and Secure Imported Water Supplies” of the Capitol Core contract extension as recommended in the Staff Report for Agenda Item 12.

The IWVGA has not yet collected any Replenishment Fee revenues and therefore the IWVGA cannot answer two fundamental and foundational questions: how much water is needed and what price can the IWVGA afford?

During the meetings that led to adoption of the Replenishment Fee, IWVGA staff and decision-makers repeatedly explained that collection of the Replenishment Fee was necessary for the agency to understand how much water should be secured. Given that the Replenishment Fee has not yet been collected, it is therefore premature to pursue the purchase of a water right entitlement because the necessary amount is undetermined.

Further, it is speculative how much the IWVGA will collect in Replenishment Fee receipts. Therefore, it is highly uncertain how much, if anything, the IWVGA could afford to pay pursuant to a binding contract. As the Board is aware, the Groundwater Sustainability Plan (“GSP”), which is foundational to the Replenishment Fee, has not yet been approved by the California Department of Water Resources (“DWR”). DWR could require material changes to the GSP that undermine the Replenishment Fee or require substantial changes to thereto. Likewise, Mojave and other stakeholders objected strenuously to the substantive and procedural flaws in the Replenishment Fee and its adoption process. The Replenishment Fee is now the subject of at least two lawsuits, creating substantial uncertainty as to its legal viability and procedural soundness.

Given the uncertainty over the fate of the ill-formulated Replenishment Fee and the uncertainty as to how much water is actually needed, it is premature to pursue acquisition of a water right entitlement, especially without a plan to actually deliver water to the Basin.

#### **V. Agenda Item 14: Board Consideration and Approval of Acceptance Letter for Participation in Transient Pool Program**

Mojave first notes that this item was improperly agendized. The IWVGA Board agenda released on Friday, January 15, 2021 describes this item as: “14. BOARD CONSIDERATION AND APPROVAL OF ACCEPTANCE LETTER FOR PARTICIPATION IN TRANSIENT POOL PROGRAM.” This description is repeated in the agenda attached to the Board packet released on January 20, 2021. The staff report included in the Board packet, however, describes the item as: “AGENDA ITEM NO. 14 - PUBLIC HEARING AND BOARD CONSIDERATION AND ADOPTION OF RESOLUTION 01-21 REVISING THE TRANSIENT POOL AND FOLLOWING PROGRAM AND ADOPTION OF RELATED CEQA FINDINGS.” Under the Brown Act, the public is entitled to at least 72-hours advanced notice that this item contemplates a hearing and adoption of a new resolution. (Gov. Code §§ 54954(a), 54954.2.)<sup>1</sup> The IWVGA Board

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<sup>1</sup> Moreover, as we previously raised, the IWVGA’s pattern and practice of belatedly providing access to the materials comprising the Board packet is problematic under Government Code section 54954.1. By its prior comments dated June 18, 2020, July 15, 2020, and June 19, 2020, Mojave asked the IWVGA to begin releasing Board packets in a timely manner to facilitate public participation and raised the issue that the IWVGA’s failure to timely provide Board packets along with each meeting agenda chills public participation

cannot take action on an item, such as a resolution, not appearing on the posted agenda. (Gov. Code §§ 54954.2; 54952.6.) Therefore, this item should be continued to the February IWVGA Board meeting and properly agendized for that meeting. The proposed 60-day rescission period could be extended accordingly. We further request that a redlined version of the Amended Report on Transient Pool and Fallowing Program be made available when this item is re-agendized to clearly identify the changes that are proposed to the August 2020 Report.

Substantively, Mojave agrees with the proposed revisions to the Transient Pool and Fallowing Program to the extent that they would allow transferability of Transient Pool allotments. As you know, Mojave repeatedly requested, in comments both on the GSP and the Transient Pool and Fallowing Program originally adopted in August 2020, that Transient Pool allotments be made transferrable.

In all other respects, Mojave continues to object to its exclusion from the Transient Pool and Fallowing Program and incorporates by reference its prior comments and objections to this program. In particular, for the reasons previously identified, Mojave disagrees with the conclusion that the Transient Pool and Fallowing Program as originally adopted, or modified by proposed Resolution No. 01-21, is exempt from compliance with the California Environmental Quality Act. Likewise, Mojave continues to object to the IWVGA's proposal to condition participation in the Transient Pool on a waiver of claims against the IWVGA. This condition is unlawful as recognized in *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1159–60.

## VI. Conclusion

We thank you for your attention to our comments on these items and urge the IWVGA to address each comment prior to taking action at today's Board meeting.

Sincerely,



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Amy M. Steinfeld

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and is contrary to SGMA's overarching requirements to establish stakeholder engagement as critical to achieving improved outcomes, optimizing resources, building broad support, and reducing conflict. (See e.g., Wat. Code §§ 10720.1, 10723.4 et seq., 10725.2, 10730(b)(2).)

Unfortunately, the IWVGA's practice of belatedly releasing its Board packets has continued. The incomplete Board packet for the January 21, 2021 meeting was released to the public just prior to 11:00am on January 20, 2021, only 24 hours in advance of the Board meeting and several days after the release of the agenda. Mojave reiterates its previous requests and again asks the Board to timely release all meeting materials when the agenda is posted, consistent with Government Code section 54954.1, which requires the IWVGA to distribute its Board packets "at the time the agenda is posted pursuant to Section 54954.2 and 54956 or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first." (Gov. Code § 54954.1 [emphasis added].)